Scanned
14/10/2021.

THE SENATE
RECEIVED
14 OCT 2021
CLERK'S OFFICE

REPUBLIC OF KENYA

TWELFTH PARLIAMENT (FIFTH SESSION)

THE SENATE

.....

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

.....

REPORT ON A STATEMENT SOUGHT BY SEN. MUTULA KILONZO JUNIOR, CBS, MP, REGARDING DELAYS IN THE APPOINTMENT OF JUDGES OF THE HIGH COURT AND THE COURT OF APPEAL

.....

Approved
14/10/2021

Rt. Hon. Speaker
You may approve
for Tabling.
14/10/21

Clerk's Chambers,
First Floor,
Parliament Buildings,
NAIROBI.

DC-ELI
Forwarded & recommended
for Tabling
14/10/2021

October, 2021

TABLE OF CONTENTS

ABBREVIATIONS AND ACRONYMS

AG	Attorney-General
COK	Constitution of Kenya
ELC	Environment and Lands Court
ELRC	Employment and Labour Relations Court
JSC	Judicial Service Commission
OAG	Office of the Attorney General

FOREWORD BY THE CHAIRPERSON

1. At the Sitting of the Senate held on Tuesday, 5th May, 2020, the Senator for Makueni County, Sen. Mutula Kilonzo Junior, CBS, MP sought a Statement from the Standing Committee on Justice, Legal Affairs and Human Rights, regarding the delay in appointment of forty-one (41) Judges of the High Court and the Court of Appeal. This followed the nomination by the Judicial Service Commission of the said persons for appointment as Judges of the superior courts, in July and August 2019, which was yet to be effected.

2. Pursuant to its mandate under the Senate Standing Orders, the Standing Committee on Justice, Legal Affairs and Human Rights commenced an inquiry into the matter, with a view to establishing the circumstances around the delay to Gazette and swear in the said Judges.

3. In undertaking the inquiry, the Committee received written and oral submissions from the Attorney General, and further examined various documents, reports, and caselaw on the matter. An overview of these is found at Chapters two and three of this Report.

4. Through these engagements, the Committee was able to gain insight on the stated causes for the delay in gazettement of the said Judges, interrogate the continued failure to effect the recommendations of the Judicial Service Commission, ventilate on the continued failure of the Executive to obey Court orders and deliberate on the resultant backlog of cases that has arisen from this undue and unjust delay.

5. During the Committee inquiry, His Excellency the President proceeded to Gazette thirty-six nominees who were subsequently sworn in as Judges on 4th June, 2021. This omitted six persons nominated for appointment as Judges of the High Court and the Court of Appeal, thus giving rise to additional issues for consideration by the Committee.

6. The Committee has now concluded on its inquiry into the matter, following which it has made observations and recommendations as set out at Chapter Four of this Report. Notably, the Committee decries the fragrant breach of the letter and spirit of the Constitution initially by the delay to appoint the forty-one Judges of the High Court and the Court of Appeal as nominated by the Judicial Service Commission and, later, by the selective appointment of some of the Judges while leaving out others.

7. The Committee observes that this amounts to denial of due process and the right to fair hearing for the six persons, it erodes public confidence in democracy and the rule of law, it negatives impacts on the expeditious dispensation of justice, and it continues the worrying trend of willful disobedience of court orders by the Executive. Ultimately, the actions of the President and the Executive undermine the independence of the Judiciary

8. The Committee takes cognizance of the fact that a statement is not normally responded to by way of a report. However, the preparation of a report was necessitated by the fact that this subject matter is of great public interest, due to its impacts on the rule of law and the independence of the Judiciary, both of which fall within the mandate of the Committee to promote, defend, and uphold.

9. The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it in undertaking consideration of this issue. The Committee further wishes to thank the office of the Attorney General who appeared before and presented both written and oral submissions to the Committee.

10. It is now my pleasant duty, pursuant to Standing Order 213, to present the Report of the Standing Committee on Justice, Legal Affairs and Human Rights on the request for a Statement regarding the delay in appointment of forty-one (41) Judges in the High Court and Court of Appeal.

Signed…….. Date……5th October, 2021……

SEN. ERICK OKONG'O MOGENI, SC, MP
CHAIRPERSON
STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON A REQUEST FOR STATEMENT REGARDING THE DELAY IN APPOINMENT OF JUDGES OF THE HIGH COURT AND THE COURT OF APPEAL

We, the undersigned Members of the Standing Committee on Justice, Legal Affairs and Human Rights, do hereby append our signatures to adopt this Report-

Sen. Erick Okong'o Mogeni, SC, MP	-Chairperson	
Sen. (Canon) Naomi Jilo Waqo, MP	-Vice-Chairperson	
Sen. Amos Wako, EBS, EGH, SC, FCIArb, MP	-Member	
Sen. James Orengo, EGH, SC, MP	-Member	
Sen. Mohamed Yusuf Haji, EGH, MP	-Member	
Sen. Fatuma Dullo, CBS, MP	-Member	
Sen. Mutula Kilonzo Junior, CBS, MP	-Member	
Sen. Irungu Kang'ata, MP	-Member	
Sen. Johnson Sakaja, CBS, MP	-Member	

PREFACE

1. The Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to the Senate Standing Order 212 and mandated to: -

   'consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.'

2. The Committee is comprised of –
   1) Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
   2) Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
   3) Sen. Amos Wako, EGH, SC, FCIArb, MP
   4) Sen. James Orengo, EGH, SC, MP
   5) Sen. Fatuma Dullo, CBS, MP
   6) Sen. Mutula Kilonzo Junior, CBS, MP
   7) Sen. Irungu Kang'ata, CBS, MP
   8) Sen. Johnson Sakaja, CBS, MP

3. The Minutes of the Sittings of the Committee in considering the matter of the request for a statement on the delay in appointment of the forty-one (41) Judges in the High Court and Court of Appeal are attached to this Report collectively as ***Annex 1***.

CHAPTER ONE: INTRODUCTION AND CONSIDERATION OF THE STATEMENT

A. BACKGROUND

1. By way of Notices published in the Kenya Gazette Vol. CXXI—No. 20, dated 15th February, 2019, the Judicial Service Commission gave notice of vacancies and invited applications for positions of Judges as follows –

   G. N. No. 1420 - Vacancies in the Office of Judge of the Court of Appeal (*11 Posts*)

   G. N. No. 1421 - Vacancies in the Office of Judge of the Environment and Land Court (*20 Posts*)

   G. N. No. 1422 - Vacancies in the Office of Judge of the Employment and Labour Relations Court (*10 Posts*)

   An Extract of the said Kenya Gazette is attached to this Report as ***Annex 2***.

2. Advertisements for the vacancies were also placed in the Daily Nation and The Standard newspapers on 22nd February, 2019 (***Annex 3***).

B. THE RECRUITMENT PROCESS

3. Following the declaration for vacancies and advertisements inviting qualified candidates to apply, the Judicial Service Commission received a total of 113 applications for the position of Judge of the Court of Appeal, of whom 35 were shortlisted and interviewed.

4. From the interviews, the Commission recommended eleven (11) persons for appointment as Judges of the Court of Appeal, in accordance with Part III of the First Schedule of the Judicial Service Act. These were –

   1) Hon. Mr. Justice Tuiyott Francis
   2) Hon. Lady Justice Omondi Hellen Amolo
   3) Hon. Lady Justice Nyamweya Pauline
   4) Hon. Mr. Justice Korir Weldon Kipyegon
   5) Hon. Mr. Justice Msagha A. Mbogholi
   6) Hon. Mr. Justice Muchelule Aggrey Otsyula
   7) Dr. Kibaya Imaana Laibuta
   8) Hon. Lady Justice Lesiit Jessie Wanjiku
   9) Hon. Lady Justice Ngugi Grace Mumbi
   10) Hon. Mr. Justice Odunga George Vincent
   11) Hon. Mr. Justice Joel Mwaura Ngugi

5. The Commission also received a total of 229 applications for the position of Judge of the Environment and Land Court, and 160 applications for the position of Judge of the Employment and Labour Relations Court. The JSC proceeded to shortlist 63 and 29 candidates, respectively, who were interviewed and vetted for the positions.

6. Arising from this, the Commission recommended twenty (20) persons for appointment as Judges of the Environment and Land Court and ten (10) persons for appointment as Judges of the Employment and Labour Relations Court.

These were –

Judges of the Environment and Land Court

1) Mboya Oguttu Joseph
2) Naikuni Lucas Leperes
3) Mwanyale Michael Ngolo
4) Makori Evans Kiago
5) Addraya Edda Dena
6) Kimani Lilian Gathoni
7) Kamau Joseph Mugo
8) Wabwoto Karoph Edward
9) Koross Anne Yatich Kipingor
10) Gicheru Maxwell Nduiga
11) Mogeni Ann Jacqueline Akhalemesi Anam
12) Ongarora Fred Nyagaka
13) Christopher Kyania Nzili
14) Mugo David Mwangi
15) Omollo Lynette Achieng'
16) Cheruiyot Judith Elizabeth Omange
17) Washe Emmanuel Mutwana
18) Nyukuri Annet
19) Murigi Theresa Wairimu
20) Asati Esther

Judges of the Employment and Labour Relations Court

1) Gakeri Jacob Kariuki
2) Baari Christine Noontatua
3) Keli Jemima Wanza
4) Mwaure Anna Ngibuini
5) Matanga Bernard Odongo Manani
6) Rutto Chemtai Stella
7) Kebira Ocharo

8) Okeche Harrison Ogweno
9) Kitiku Agnes Mueni-Nzei
10) Nderitu David Njagi

7. The Commission forwarded the said forty-one (41) of persons recommended for appointment as Judges of the High Court and the Court of Appeal to H.E. the President for formal appointment, as required under Article 166(1) (b) of the Constitution.

8. The statements issued by the Judicial Service Commission on 22nd July, 2019 and 13th August, 2019 in respect of the said recruitment processes are attached to this Report as ***Annexes 4 and 5***, respectively.

C. REQUEST FOR STATEMENT ON THE DELAYED APPOINTMENT OF THE FORTY-ONE (41) JUDGES OF THE HIGH COURT AND COURT OF APPEAL

9. At the Sitting of the Senate held on Tuesday, 5th May, 2020, the Senator for Makueni County, Sen. Mutula Kilonzo Junior, CBS, MP requested for a statement from the Standing Committee on Justice, Legal Affairs and Human Rights, regarding the delay in appointment of Judges of the High Court and the Court of Appeal.

10. In the Statement, the Senator sought the following information: -
    i) Explain the reason(s) for the delay in gazettement of the forty-one (41) Judges [nominated by the Judicial Service Commission];
    ii) Explain the continued failure to effect the recommendations of the Judicial Service Commission, thus occasioning the violation of fundamental rights of persons designate as Judges of the High Court and the Court of Appeal;
    iii) Explain the continued failure by the Executive to obey Court Orders and the Judgment delivered on 6th February, 2020, hence jeopardizing the administration of justice; and
    iv) State when the gazettement of the said Judges is to be done in order to beat the backlog experienced in the Courts.

11. In contributing to the request for Statement, Senators noted with concern the failure by the government to comply with court orders; and the adverse effect that the non-appointment of Judges of the superior courts was having on the dispensation of justice.

12. A copy of the request for Statement is attached as ***Annex 6***, while an extract of the Hansard for the Senate sitting held on Tuesday, 5th May, 2020 is attached as ***Annex 7***.

D. CONSIDERATION OF THE REQUEST FOR STATEMENT

13. The Standing Committee on Justice, Legal Affairs and Human Rights proceeded to consider the request for statement and, *vide* a letter dated 7th May, 2020, invited the Attorney General to submit a written response to the Statement sought by Sen. Mutula Kilonzo Junior, CBS, MP on or before Friday, 15th May, 2020.

14. The Attorney General responded vide a letter dated 1st September, 2020 in which he submitted that –
    a) The Court, in the *Adrian Kamotho Njenga case*, did not issue any injunctive orders against H.E. the President directing him to do or refrain from doing anything.
    b) On the Government's instructions, the Attorney General filed a Notice of Appeal against the Judgment and Orders of the Court on 6th February, 2020. The AG further sought to be supplied with typed copies of the Court's proceedings and a certified copy of the decree and judgment, to enable his office to lodge an appeal from the decision of the High Court to the Court of Appeal.
    c) The Petitioner had filed an application dated 24th February, 2020 seeking orders, among others, that the appointments having fallen due upon the expiry of 14 days from the date of the High Court judgment, and the appointing authority having failed to act as per the Constitution, the appointments had legally ripened and crystallized. The application was however dismissed by the Court in a Ruling issued on 31st July, 2020.
    d) On 18th August, 2020, the Attorney General filed the substantive appeal to the decision of the High Court before the Court of Appeal, being Nairobi Civil Appeal No. 286 of 2020: *Attorney General -vs- Adrian Kamotho Njenga & 2 Others*. Among the grounds on which the appeal was premised were that –
        i) The learned judges erred in their construing of the relevant provisions of the Constitution thereby arriving at an interpretation of the Constitution that led to institutional tyranny;
        ii) The learned judges erred in finding that the President's role in appointment process of Judges was purely ceremonial/ facilitative; and
        iii) The learned Judges erred when they failed to appreciate the applicability of the provisions of Article 10 of the Constitution to the President's role in the appointment of Judges.

15. The Attorney General further submitted that the matter was then actively before the Court of Appeal and was therefore *sub-judice*.

16. A copy of the letter dated 7th May, 2020 and addressed to the Attorney General is attached as ***Annex 8***, while a copy of the response thereon dated 1st September, 2020 is attached as ***Annex 9***.

17. By a letter dated 10th May, 2021, the Committee invited the Chief Registrar of the Judiciary to appear before the Committee and present submissions on the impact of the said delay in appointment of judges on the operations of the High Court and Court of Appeal, and the efforts then being undertaken to resolve the impasse. A copy of the letter is attached as ***Annex 10***. A response to this was however not received.

E. MEETING WITH THE ATTORNEY GENERAL

18. Following an invitation from the Committee, the Attorney General appeared before the Standing Committee on Justice, Legal Affairs and Human Rights on Wednesday, 26th May, 2021 to respond to, among others, the Statement sought on the delay in appointment of Judges of the High Court and the Court of Appeal.

19. The Attorney General informed the Committee that his office had since filed the substantive appeal against the Judgment of the High Court directing H.E. the President to appoint the Judges. The matter was pending filing of submissions by the other party and for the Court of Appeal to render its judgment on the matter.

20. Thereupon, Members raised concern regarding –
    a) the fact that there was no stay in place against implementation of the High Court judgment on the appointment of Judges, yet no steps had been taken by the State to implement the judgment;
    b) the reputational risk that the continued non-appointment of the Judges posed to the affected judges;
    c) the probity of the Attorney General litigating in the Courts against a decision of the Judicial Service Commission in which he sat as a Member; and
    d) the slow pace at which the matter was proceeding at the Court of Appeal, compared to the speed with which other matters of great public interest were considered by the Courts.

21. Members further observed that –

i) The delayed appointment was a source of great discomfort to the candidates recommended for appointment as it cast aspersions on their integrity and professional capacity;

ii) The delay further caused distress to the said nominees as they harbored reasonable expectations to have progressed to the next level of their Judicial careers;

iii) The delay had been unreasonable in the circumstances, including a case where a nominee for appointment had died before assuming office;

iv) The delay was demoralizing and discouraging towards Advocates who awaited appointment as Judges and anticipated the opportunity to serve the nation through the Judiciary; and

v) There was a huge backlog of cases because of the High Court and the Court of Appeal operating below capacity. Additionally, several stations where the Court of Appeal was expected to sit were no longer staffed with Court of Appeal Judges.

22. In response, the Attorney General submitted that, since the question of appointment of the Judges was pending in Court, then the Government was bound to await the determination of the Courts before proceeding to take any action on the matter.

F. APPOINTMENT OF THIRTY-FOUR (34) JUDGES OF THE HIGH COURT AND THE COURT OF APPEAL

23. Vide Gazette Notices Nos. 5233, 5234 and 5235 dated 3rd June, 2021, H.E. the President appointed seven (7) Judges of the Court of Appeal, nine (9) Judges of the Employment and Labour Relations Court, and eighteen (18) Judges of the Environment and Land Court.

These were –

Judges of the Court of Appeal

1) Hon. Mr. Justice Msagha Amraphael Mbogholi
2) Hon. Lady Justice Omondi Hellen Amollo
3) Hon. Lady Justice Ngugi Grace Mumbi
4) Hon. Mr. Justice Francis Tuiyott
5) Hon. Lady Justice Nyamweya Pauline Nyaboke
6) Hon. Lady Justice Lesiit Jessie
7) Dr. Kibaya Imaana Laibuta

Judges of the Employment and Labour Relations Court

1) Baari Christine Noontatua
2) Gakeri Jacob Kariuki
3) Keli Jemima Wanza
4) Mwaure Ann Ngibuini
5) Matanga Bernard Odongo Manani
6) Rutto Stella Chemtai
7) Kebira Ocharo
8) Kitiku Agnes Mueni-Nzei
9) Nderitu David Njagi

Judges of the Environment and Land Court

1) Mboya Oguttu Joseph
2) Naikuni Lucas Leperes
3) Mwanyale Michael Ngolo
4) Addraya Edda Dena
5) Kimani Lilian Gathoni
6) Kamau Joseph Mugo
7) Wabwoto Karoph Edward
8) Koross Anne Yatich Kipingor
9) Gicheru Maxwell Nduiga
10) Mogeni Ann Jacqueline Akhalemesi
11) Ongarora Fred Nyagaka
12) Christopher Kyania Nzili
13) Mugo David Mwangi
14) Omollo Lynette Achieng'
15) Washe Emmanuel Mutwana
16) Nyukuri Annet
17) Murigi Theresa Wairimu
18) Asati Esther

24. A copy of the Kenya Gazette Vol. CXXIII—No. 124 dated 3rd June, 2021 is attached as ***Annex 11***.

25. The thirty-four Judges were subsequently sworn into office on Friday, 4th June, 2021.

26. The appointments by H.E. the President omitted the following judicial officers who had been nominated for appointment as Judges of the Court of Appeal and the High Court –

High Court Judges Nominated as Judges of the Court of Appeal

1) Hon. Mr. Justice Korir Weldon Kipyegon
2) Hon. Mr. Justice Muchelule Aggrey Otsyula
3) Hon. Mr. Justice Odunga George Vincent
4) Hon. Mr. Justice Joel Mwaura Ngugi

Chief Magistrate Nominated as Judge of the Environment and Land Court

1) Makori Evans Kiago

High Court Registrar Nominated as Judge of the Environment and Land Court

1) Cheruiyot Judith Elizabeth Omange

27. The decision of the president was condemned by among others, the Law Society of Kenya (LSK) and Judicial Service Commission, which urged him to reconsider his decision

CHAPTER TWO: LITIGATION ON THE ISSUE OF APPOINTMENT OF JUDGES

28. Several cases were filed in Court relating to the delay in the appointment of the Judges of the High Court and the Court of Appeal, and the subsequent appointment of some of the Judges while leaving out others. The key suit in this regard is that of *Adrian Kamotho Njenga*, which is discussed below.

a) ***Petition No. 369 of 2019: Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)***

29. On 18th September, 2019, Mr. Adrian Kamotho Njenga, a citizen and public interest litigant, filed a Petition before the Constitutional and Human Rights Division of the High Court, challenging the President's failure to formally appoint the forty-one persons nominated as Judges of the High Court and the Court of Appeal.

30. In the suit, the Petitioner averred that –
    a) The Judicial Service Commission had carried out the recruitment process in compliance with the provisions of the law and that the President had failed to act within a reasonable time, in the performance of a critical constitutional function as required by the Constitution.
    b) A reasonable timeline for performing a constitutionally prescribed act is fourteen days, and failure to discharge a constitutional obligation within that period constituted unreasonable and unjustifiable delay, given the then urgent need to plug the extreme deficit of judges in the superior courts.
    c) The President's failure to effect the JSC's recommendations violated his fundamental rights, those of persons designated as judges of the superior courts and the public at large, to proper administration of justice.
    d) The President's action violated the principles of the rule of law, social justice, good governance, equality, transparency, and accountability under Article 10 of the Constitution.

31. The Petitioner further argued that the failure to appoint the Judges at that time violated the wider citizenry's right of access to justice as guaranteed by Article 48 of the Constitution, and that the inordinate delay in appointing the persons recommended by the JSC as judges of the Superior Courts was weighing heavily and negatively on the administration of justice in the country.

32. The Petitioner therefore sought the following reliefs:

a) A declaration that the President's failure to appoint the persons recommended for appointment as Judge of the Court of Appeal on 22nd July, 2019; Judge of the Environment and Land Court, and Judge of the Employment and Labour Relations Court, on 13th August, 2019 violates Articles 1, 2(1), 3(1), 10, 47, 48, 73, 131(2), 166(1)(b) and 259(8) of the Constitution.
b) A declaration that having been duly recommended for appointment as required by the Constitution and the law, and the President having failed to appoint them as constitutionally mandated, the persons recommended for appointment as Judge of the Court of Appeal on 22nd July, 2019; Judge of the Environment and Land Court, and Judge of the Employment and Labour Relations Court, on 13th August, 2019, are at liberty to assume office as Judge of the Court of Appeal, Judge of the Environment and Land Court, and Judge of the Employment and Labour Relations Courts respectively, as recommended by the Judicial Service Commission.
c) An order that the Respondent and the Interested Parties take immediate measures and/or steps to enable the persons recommended for appointment as Judge of the Court of Appeal on 22nd July, 2019; Judge of the Environment and Land Court, and Judge of the Employment and Labour Relations Court, on 13th August, 2019 to discharge their constitutional mandate.

33. In a replying affidavit filed on behalf of the Judicial Service Commission, it was deposed that the JSC considered and deliberated on all the reports and information received from members of the public and state agencies before making a decision on the applicants. According to the Commission, a letter dated 5th July, 2019 was received from the National Intelligence Service (NIS) to the effect that it had received adverse reports against some of the Applicants but did not furnish the reports, nor were any particulars of the alleged adverse reports provided to the Commission to enable the affected persons to respond, as required by Article 47 of the Constitution and section 4(3)(g) of the Fair Administrative Action Act.

34. The JSC further submitted that the NIS was given an opportunity to provide particulars of the adverse reports since the entire exercise of recruitment of Judges was time bound, but in its letter dated 21st July, 2019, the NIS declined stating that it had discharged its obligation in its first letter.

35. On its part, the Law Society of Kenya submitted that the Constitution has in-built mechanisms for the removal and or disciplining of errant judicial officers under Article 168, which mechanisms had not been triggered against any of the judges recommended for appointment to the Court of Appeal.

36. In opposing the Petition, the Head of the Public Service filed an affidavit in which it was deposed, *inter alia* –
    a) That the process of removal of judges once appointed into office is elaborate, laborious, and expensive hence the need not to rush the process of appointment.
    b) That in appropriate cases and circumstances, the recommendations by the Judicial Service Commission may be subjected to review by either the courts or the JSC and, consequently, it would be remiss of the President to appoint the judges without considering the impact to the principles of good governance, integrity, accountability, public participation, and sustainable development.
    c) That H.E. the President had received adverse reports in respect of some of the persons recommended for appointments as judges after the names of the said nominees were published in the media, and that it would be irresponsible and contrary to the oath of office for the President to appoint judges, or indeed any other public or State officers to office, where serious questions have been raised about their integrity, more so judges who enjoy security of tenure and whose probity and integrity should be above reproach.
    d) That the President was actively consulting with relevant State organs with a view to taking appropriate legal and administrative action, including a review of the recommendations, actions that had since been suspended pending the hearing and determination of that petition.

37. The matter was heard by a 3-Judge Bench which issued its Judgment thereon on 6th February, 2020, in which it allowed the Petition. The Court proceeded to issue the following orders –
    a) A declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the [Judicial Service Commission] in accordance with Article 166(1) as read with Article 172(1)(a) of the Constitution on the persons to be appointed as Judges.
    b) A declaration be and is hereby issued that the President's failure to appoint the persons recommended for appointment as Judges violates the Constitution and the Judicial Service Act.
    c) A declaration be and is hereby issued that the continued delay to appoint the persons recommended as judges of the respective courts is a violation of Articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution

38. A copy of the High Court Judgment is attached to this Report as ***Annex 12***.

39. By a Notice of Motion dated and filed on 24th February, 2020, Mr. Adrian Kamotho Njenga sought, among others, order orders –
    i) directing the JSC to within 3 days publish for general information of the public in the Kenya Gazette, the names of the persons recommended for appointment as judge of the High Court and the Court of Appeal;
    ii) compelling the Chief Justice to administer on the said Judges the oath or affirmation of office, in the manner and form prescribed by the Third Schedule to the Constitution; and
    iii) directing the Chief Registrar of the Judiciary to execute any document or legal instrument necessary for the full and proper assumption of office by the persons recommended for appointment as judges of the High Court and the Court of Appeal.

40. By a Ruling issued on 30th July, 2021, the Court declined to issue the said orders and dismissed the motion. A copy of the said Ruling is attached to this Report as ***Annex 13***.

41. Being dissatisfied with the decision of the High Court on the matter, the Attorney General filed *Nairobi Civil Appeal No. 286 of 2020: Attorney General -vs- Adrian Kamotho Njenga & 2 Others*. The appeal was pending determination as of the date of this Report.

b) <u>Other Suits relating to the issue</u>

42. Several other suits have been filed in various Courts on the issue of the delay in appointment of the Judges of the High Court and the Court of Appeal. Among these are –
    a) HC Petition No. 206 of 2020, *Katiba Institute v President of Republic of Kenya & 2 others; Judicial Service Commission & 3 others (Interested Parties)*, in which the Petitioner sought to enforce the declaratory orders or of the High Court.

    b) HC Petition No. 251 of 2019, *Zack Kinuthia v Judicial Service Commission; Ngugi Grace Mumbi & 3 others (Interested Parties)*, in which the Petitioner sought to have the elevation of 3 Judges from the High Court to the Court of Appeal stayed, until petitions which had been filed for the removal of the three judges from office were heard and determined. The Petition was dismissed.

    c) HC Petition No. 427 of 2019, *David Kariuki Ngari & another v Judicial Service Commission & another; Law Society of Kenya & 2 others (Interested Parties)*, in which the Petitioner sought orders declaring the nomination of the said Judges

declared unconstitutional for, among others, want of public participation prior to prior to the declaration of vacancies in the office of judge in the respective courts. Additionally, the Petitioner sought orders declaring that the President's power on appointment of Judges under Article 166 of the Constitution, was not merely ceremonial, and that the President can decline to appoint or recall the name of any person nominated for appointment as a Judge.

The Court found the Petition to be without merit and therefore dismissed it. In doing so, the Court reiterated that –

'...the appointment of Judges is anchored in Article 166(1)(b), as read with Article 172(1)(a) of the Constitution, which provide that Judges shall be appointed by the President in accordance with the recommendation of the [JSC]. We also note that under the Judicial Service Act, it is the [JSC] that is tasked with the mandate to determine suitability and the appropriate constitutional and statutory qualifications for persons to appoint as Judges. ***In that regard, the Constitution and the law contemplate no other role for the President, any other authority or body in determining the persons to appoint as judges.***'

A copy of the Judgment thereon, dated and issued on 6th February, 2020, is attached to this Report as ***Annex 14***.

43. Following the appointment, by the President, of thirty-four Judges of the High Court and the Court of Appeal, and the omission to appoint six persons nominated by the JSC for appointment as judges of the said superior courts, other suits were filed, among them –
    a) A suit filed in Nakuru by Dr. Magare Gikenyi Benjamin, in which he sought orders declaring that the swearing in of the thirty-four Judges was illegal; and
    b) A suit by Katiba Institute seeking to have the Chief Justice and the JSC barred from assigning any duties to the thirty-four Judges who were sworn in, until the remaining six were also formally appointed and sworn in.

44. As of the time of this Report, a bench had been empaneled to hear and determine the two Petitions.

CHAPTER THREE: ANALYSIS OF THE ISSUES

A. THE PROCEDURE FOR APPOINTMENT OF JUDGES PRIOR TO THE CONSTITUTION OF KENYA, 2010

1) Operations of the Judiciary During the Colonial Period

45. Historically, judicial appointments fell under the ambit of the President. The powers given to the President to appoint and remove Judges at that time resulted in judicial appointments being premised on allegiance to the Executive rather than on upholding justice and the rule of law. Indeed, one could easily surmise that the President's delaying appointment of the forty-one judges is a *mala fide* attempt to revert to the old way of doing this, consequently resulting in the undermining of the strides made and achieved after the promulgation of the Constitution of Kenya, 2010.

46. The judicial system in colonial Kenya was fashioned according to the British Court system in which the Judiciary was seen as separate from the machinery of government and therefore lacking in power to review the executive's decisions. Back then, even the Judges, through socialization, believed in the complete separation of the judiciary from the politics of governance. At the time, administrative officials such as District Commissioners and District Officers exercised judicial powers as magistrates, which inevitably resulted in a conflation of the Executive and the Judiciary.

47. Additionally, the legal profession being elitist in nature and dominated by Europeans and a few Indians meant that the High court was dominated by Europeans, resulting in poor representation of the Indigenous Africans who lived in Kenya.

2) Appointment of Judges Post-Independence and adoption of the Independence Constitution

48. Since its independence in 1963, Judges in Kenya were appointed by the President, considering the advice of the Judicial Service Commission (JSC) as provided in the Constitution of that time. The 1963 Constitution, in this regard, provided as follows:

    a) On appointment of the Chief Justice and Judges of the Supreme Court:

    172. (1) The Chief Justice shall be appointed by the Governor of judges of General, acting in accordance with the advice of the Prime Minister:

Provided that before tendering advice of the purposes of this subsection the Prime Minister shall consult the Presidents of the Regional Assemblies and shall not advise the Governor-General to appoint any person as Chief Justice unless the Presidents of not less than four Regional Assemblies concur in his tendering such advice.

(2) The puisne judges shall be appointed by the Governor General, acting in accordance with the advice of the Judicial Service Commission.

(3) (a) A person shall not be qualified to be appointed as a judge of the Supreme Court unless-
(i) he is, or has been, a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or a court having jurisdiction in appeals from such a court; or
(ii) he holds one of the specified qualifications and has held one or other of those qualifications for a total period of not less than seven years

(b) In this subsection "the specified qualifications" means the professional qualifications specified by the Advocates Ordinance(a) (or by or under any law amending or replacing that Ordinance) one of which must be held by any person before he may apply under that Ordinance (or under any such law) to be admitted as an advocate in Kenya.

b) On appointment of Judicial Officers:

185. (1) The power to appoint persons to hold or act in any offices to which this section applies (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office shall vest in the Judicial Service Commission.
(2) The Judicial Service Commission may, by directions in writing and subject to such conditions as it thinks fit, delegate any of its powers under subsection (1) of this section to any one or more of its members or to any judge of the Supreme Court or to any person holding or acting in an office to which this section applies or, in the case of a power that relates to an office connected with the Court of Appeal for Kenya, to any judge of that Court:
Provided that a power that relates to an office the holder of which is required to possess legal qualifications may not be delegated under this subsection except to one or more members of the Commission.

(3) The offices to which this section applies are—

(a) the office of Registrar or Deputy Registrar of the Court of Appeal for Kenya;

(b) the office of Registrar or Deputy Registrar of the Supreme Court; -

(c) the office of Senior Resident Magistrate or Resident Magistrate;

(d) the office of Kadhi;

(e) the office of president or member of any African court;

(f) the office of president or member of any subordinate court (other than an African court or the court of a Kadhi or the court of any magistrate who is authorized, by or under any law, to hold such a court by virtue of his holding or acting in any public office); or

(g) such other offices of member of any court (other than the Judicial Committee) or connected with any court (other than the Judicial Committee) as may be prescribed by Parliament.

49. This method of appointment proved problematic, as the members of the JSC also turned out to be political appointees who were directly appointed by the President, and as such unlikely to be partisan and susceptible to executive influence and interference. The Judiciary was still not independent from the Executive and, in an attempt to centralize power and have complete control over all arms of Government and outcomes of cases dealing with corruption before the court, the Executive continued to consistently undermine the Judiciary.

50. Prior to 2010, the President appointed the Chief Justice, who was the head of the JSC and held great sway in the selection of other judges. This invariably created a situation in which members of the Commission were unwilling to independently air their views or even disagree with or criticize the Chief Justice. Consequently, the JSC's lack of independence and impartiality led to the compromise of the nomination of suitable candidates for the Bench.

51. In those days, the judicial appointment mechanisms were not subject to public scrutiny, thereby being neither transparent, fair nor accountable to public interest. This was as a result of judicial vacancies that would arise not being advertised and the criteria for selecting individuals for judicial office was concealed from the Public.

52. It is noted that there was no discernible or written criteria to guide the President's selection of a Chief Justice. The only requirement for individuals to qualify as Judge in Kenya as provided in the 1963 Constitution was that one must be an advocate of the High Court of Kenya with seven (7) years' experience. There was no requirement on whether they practiced as an advocate.

B. PUBLIC VIEWS ON THE PROCEDURE FOR APPOINTMENT OF JUDGES

53. During the long process for the review of the Constitution of Kenya, one of the key areas that were highlighted as requiring reforms was the process for nomination and appointment of Judges. This is captured in both the Report of the Constitution of Kenya Review Commission and the Report of the Committee of Experts on the Constitutional Review.

54. Notably, in the Report by the Committee of Experts, it was observed that the issue of the Judiciary and its financial independence had not been adequately addressed in the previous drafts, and that the provisions in the Harmonized Draft Constitution which required that Judges be vetted by Parliament would lead to politicization of the appointment process.

55. The Committee of Experts addressed these concerns as follows –
    a) In respect of the issue of an independent vote for the Judiciary, the reviewed chapter on Public Finance contained clauses making provision for a vote for independent institutions such as Parliament, the Judiciary, and other such relevant institutions.
    b) The revised Constitution also removed the provision for vetting of all Judges by Parliament, with the exception of the Chief Justice who as the head of the Judiciary must receive parliamentary approval.

56. This position was upheld and provided for in the Constitution of Kenya 2010.

C. APPOINTMENT OF JUDGES POST PROMULGATION OF THE CONSTITUTION OF KENYA 2010

57. Following the advent of the Constitution of Kenya 2010, the process of judicial appointments shifted greatly, with the spirit of democracy and the doctrine of separation of powers being firmly espoused in the Constitution.

58. Chapter Ten of the Constitution was far more detailed in its provisions on the appointment of Judges as compared to the 1963 Constitution. Article 166 thereon provides for the appointment of Chief Justice, Deputy Chief Justice and other Judges as follows:

166. Appointment of Chief Justice, Deputy Chief Justice and other judges

(1)The President shall appoint—

(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and

(b) all other judges, in accordance with the recommendation of the Judicial Service Commission.

(2)Each judge of a superior court shall be appointed from among persons who—

(a) hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;

(b) possess the experience required under clauses (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and

(c) have a high moral character, integrity and impartiality.

(3)The Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have—

(a) at least fifteen years experience as a superior court judge; or

(b) at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or

(c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.

(4)Each judge of the Court of Appeal shall be appointed from among persons who have—

(a) at least ten years' experience as a superior court judge; or

(b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or

(c) held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

(5)Each judge of the High Court shall be appointed from among persons who have—

(a) at least ten years' experience as a superior court judge or professionally qualified magistrate; or

(b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or

(c))held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

59. The Provisions of Article 166(1)(b) leave very little room for doubt concerning the appointment of Judges. The upshot of these provisions is that once the JSC and National Assembly give their approval with respect to the appointment of the Chief Justice and Deputy Chief Justice; and the JSC gives its approval with respect to appointment of all other Judges, the President then has the duty to appoint the approved persons as Judges.

60. Nowhere in the Constitution, or any legislation for that matter, is the President given the discretion to decide whether to appoint or not appoint approved persons that have undergone the vetting process and received approval thereon as prescribed by the Constitution and the relevant Acts. To further buttress this point, Article 168 of the Constitution on removal of a judge gives the President the mandate to suspend a Judge within fourteen days of receiving the Petition, acting in accordance with the recommendation of the Judicial Service Commission.

61. The Judicial Service Act further provides the statutory framework for the transparent appointment of Judges, with the procedure for recruitment and subsequent recommendation of persons for appointment set out in detail under paragraphs 1 – 16 of the First Schedule to the Act.

62. Under Part VI of the First Schedule to the said Act, there is no provision for the President to reject or disapprove of any of the persons recommended for appointment as Judges. The duty of the President in the appointment of judges is thus framed as ceremonial and only intended to formalize the appointment of the persons recommended by the Judicial Service Commission.

CHAPTER FOUR: COMMITTEE OBSERVATIONS AND RECOMMENDATIONS

A. COMMITTEE OBSERVATIONS

63. The Committee observes that the Constitution of Kenya, 2010 and the Judicial Service Act provide for the procedure for recruitment, nomination and appointment of judges and clearly demarcates the roles of the various actors in the process. Principally, the Constitution and the Judicial Service Act vest in the Judicial Service Commission the role of recruiting and determining the suitability of persons for appointment to the position of judges of the superior and other courts.

64. The Committee noted that this reflects the aspirations of Kenyans as captured in the Reports of the Constitution of Kenya Review Commission (CKRC) and the Committee of Experts (COE), where Kenyans expressed their support for a judiciary that is truly independent of both the Executive and the Legislature. The role of Parliament was thus limited to vetting of specific office holders in the Judiciary and the Judicial Service Commission, while that of the President was limited to the formal appointment of persons nominated for appointment of persons nominated to specified offices.

65. Regarding the forty-one persons nominated by the Judicial Service Commission on 22nd July, 2019 and 13th August, 2019, for appointment as judges of the High Court and the Court of Appeal, the Committee observed that –
    a) The Judicial Service Commission undertook its mandate in accordance with the Constitution and the Judicial Service Act.
    b) The delay by H.E. the President in appointing the said Judges, that is from July and August 2019 up to June 2021, was inordinate, considering the provisions of Article 259(8) of the Constitution. Regrettably, during that time, one of the nominees for appointment as a Judge died, leaving the number of nominees awaiting appointment as forty (40).
    c) While the Attorney General cited the existence of litigation on the matter as the basis for the President's failure to appoint the said Judges, H. E. the President did proceed to appoint and swear in thirty-four (34) of the forty (40) judges, while the said suits were pending determination.
    d) According to documents filed in Court, the reservations by H.E. the President to appoint the six judges (6), as cited in the letter from the National Intelligence Service to the Judicial Service Commission, were never disclosed to the Commission or the affected nominees, as to enable them to respond.

66. The Committee further observed that there was no stay in place against the orders issued by the High Court in the *Adrian Kamotho Njenga* case, and that the State was obligated to comply with the said orders even as it sought to appeal the same.

67. Additionally, the Committee observed that it presented a conflict of interest to have the Attorney General sit as a Member of the Judicial Service Commission and at the same time litigate in the Courts against the decisions of the Judicial Service Commission, while being privy to otherwise privileged discussions, information and documents obtained or accessed while performing the role of Member of the JSC.

68. The non-appointment, firstly of all the forty-one (41) judges and, subsequently, the six (6) judges omitted from the names gazetted on 3rd June, 2021, continues to negatively affect the expeditious disposal of cases and the administration of justice across the country.

69. The six (6) persons whom H.E. the President has failed to appoint are entitled to equal protection of the law and due process as guaranteed under the Constitution. The import of this is that they must be given the opportunity to access the allegations levelled against them and given a fair opportunity to respond. This must be at the appropriate forum which, as provided for in the Constitution, is the Judicial Service Commission. The persisting situation has resulted in a case of the Judges being condemned unheard and erodes public confidence in the rule of law.

70. The Committee further observed that, even as the situation persists, the affected judicial officers continue to perform their roles, and to discharge both judicial and administrative functions in various capacities. It is improper to have a cloud of undisclosed and untested allegations hang over them and for an indeterminate period. The measure has also stalled their career progression and it is important that the issue is urgently resolved.

71. The Committee decries the persistent disobedience of court orders by the Executive and the persistent attempts to undermine the independence of the Judiciary.

72. The Committee observes that, in the recent past –

    a) Following the 13th May, 2021 Judgment of the High Court in Constitutional Petition No. E282 of 2020: *David Ndii & Others -Vs- Attorney General & Others,* in which certain declarations were made regarding H.E. the President, the latter appealed the same at the Court of Appeal on the basis that, among others, he had not been given the opportunity to be heard before the said determination by the High Court.

The Court of Appeal considered the matter and, in its Judgment delivered on 20th August, 2021, overturned the said findings of the High Court on the basis that H.E. the President ought to have been heard before the said orders were issued. This was in Civil Appeal No. E291 of 2021; *The Independent Electoral and Boundaries Commission -Vs- David Ndii & 82 Others*.

b) Following a recommendation by the Judicial Service Commission, H.E. the President constituted a tribunal to consider the suitability of Hon. Lady Justice Mary Gitumbi to continue serving as a Judge of the Environment and Land Court. This was done vide Legal Notice No. 8625 of 23rd August, 2021, pursuant to Article 168 of the Constitution and the Judicial Service Act.

73. Arising from this, the Committee observes that in the same manner that H.E. the President was accorded the opportunity to be heard before an adverse finding could be made against him, and the same way an independent tribunal was constituted to consider the suitability of the said Justice Mary Gitumbi to continue serving as a Judge, so are the said six nominees for appointment as Judges of the High Court and the Court of Appeal entitled to be heard on the allegations levelled against them, and to have the same considered and determined in accordance with the law.

B. COMMITTEE RECOMMENDATIONS

74. The Committee makes the following recommendations –

i) That H.E. the President, without any further delay, proceeds to gazette the appointment of the six (6) persons nominated by the Judicial Service Commission for appointment as Judges of the High Court and the Court of Appeal, and whose names were omitted in the Kenya Gazette Vol. CXXIII—No. 124 dated 3rd June, 2021, namely –

Persons Nominated as Judge of the Court of Appeal

a) Hon. Mr. Justice Korir Weldon Kipyegon
b) Hon. Mr. Justice Muchelule Aggrey Otsyula
c) Hon. Mr. Justice Odunga George Vincent
d) Hon. Mr. Justice Joel Mwaura Ngugi

Persons Nominated as Judge of the Environment and Land Court

a) Makori Evans Kiago
b) Cheruiyot Judith Elizabeth Omange

ii) That H.E. the President directs that any adverse information relating to the said six nominees and held by the National Intelligence Service (NIS) or other state entity, be immediately submitted to the Judicial Service Commission for consideration, pursuant to its mandate under Article 168 of the Constitution, and to accord the said six nominees the opportunity to be heard on the allegations levelled against them.

iii) That Parliament considers legislative amendments to establish specific timelines within which certain constitutional functions must be undertaken. Specifically, the Judicial Service Act (No. 1 of 2011) to be amended to provide that if the President does not appoint judges of the superior courts within fourteen days of receipt of the recommendation by the Judicial Service Commission, such judges shall be deemed to have been so appointed.

iv) That Parliament considers legislative amendments to demarcate the exercise by the Attorney General of his roles under various provisions of the Constitution, to eliminate instances that would present conflicts of interest or undermine the independence of the different arms of government as intended by the Constitution. Pending this, the Attorney General to apply the provisions of Article 156(7) by designating officers to independently exercise some of the said roles, free of interference or direction by the Attorney General, in the conduct of the said duties.

v) That the Senate notes the contents of and adopts this Report.

ANNEXES

Annex 1 - Minutes of the Committee Sittings in Consideration of the Request for Statement regarding the delay in appointment of forty-one (41) Judges of the High Court and the Court of Appeal

Annex 2 - Kenya Gazette Notices Nos. 1420, 1421 and 1422 of 15th February, 2019, declaring vacancies in the Court of Appeal, Environment and Lands Court and the Employment and Labour Relations Courts.

Annex 3 - Advertisements placed in the Daily Nation and The Standard newspapers on 22nd February, 2019.

Annex 4 - Statement issued by the Judicial Service Commission on 22nd July, 2019

Annex 5 - Statement issued by the Judicial Service Commission on 13th August, 2019

Annex 6 - A copy of the Statement sought by Sen. Mutula Kilonzo Junior, CBS, MP on 5th May, 2020

Annex 7 - Extract of the Hansard for the Senate sitting held on Tuesday, 5th May, 2020.

Annex 8 - Copy of letter Ref. No. SEN/12/4/JLAHRC/2020(36) dated 7th May, 2020 and addressed to the Attorney General.

Annex 9 - Extract of letter Ref. No. AG/LDD/685/1/10 dated 1st September, 2020 by the Attorney General

Annex 10 - Copy of letter Ref. No. SEN/12/5/JLAHRC/2021(10) dated 10th May, 2021 and addressed to the Chief Registrar of the Judiciary.

Annex 11 - Kenya Gazette Vol. CXXIII—No. 124 dated 3rd June, 2021.

Annex 12 - HCK Judgment issued on 6th February, 2020 in Petition No. 369 of 2019: *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)*

Annex 13 - HCK Ruling issued on 30th July, 2020 in Petition No. 369 of 2019: *Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties)*

Annex 14 - HCK Judgment issued on 6th February, 2020 in Petition No. 427 of 2019, *David Kariuki Ngari & another v Judicial Service Commission & another; Law Society of Kenya & 2 others (Interested Parties)*

TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE FORTY-SECOND SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON THURSDAY, 8TH JULY, 2021 AT 11.00 A.M.

PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson (**Chairing**)
2. Sen. Amos Wako, EGH, SC, FCIArb, MP - Member
3. Sen. James Orengo, EGH, SC, MP - Member
4. Sen. Fatuma Dullo, CBS, MP - Member
5. Sen. Mutula Kilonzo Junior, CBS, MP - Member

ABSENT WITH APOLOGY

1. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
2. Sen. Irungu Kang'ata, CBS, MP - Member
3. Sen. Johnson Sakaja, CBS, MP - Member

SECRETARIAT

1. Mr. Charles Munyua - Clerk Assistant
2. Ms. Sylvia Nasambu - Clerk Assistant
3. Mr. Said Osman - Researcher
4. Mr. Moses Kenyanchui - Legal Counsel
5. Ms. Purity Orutwa - Hansard Officer
6. Mr. James Ngusya - Sergeant-At-Arms
7. Mr. James Kimiti - Hansard Officer
8. Ms. Tiffany Kiarie - Attaché (*Taking Minutes*)

MIN. NO. 216/2021 PRAYER

The sitting commenced with a word of prayer by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 217/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. Amos Wako, EGH, SC, FCIArb, MP and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 218/2021 **PETITION ON THE ALLEGED LACK OF SUPPORT TO FAMILY MEMBERS OF VICTIMS OF THE ETHIOPIAN AIRLINE FLIGHT 302 AIR CRASH**

The committee considered and adopted the Report on a Petition regarding alleged lack of support to family members of victims of the Ethiopian Airline Flight 302 Air crash, having been proposed by Sen. James Orengo, EGH, SC, MP, and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

The Committee observed the need for Kenya to have a framework in place that would enable it to provide the necessary support to its nationals that lose their lives in such circumstances.

MIN. NO. 219/2021 **REQUEST FOR STATEMENT ON THE DELAY IN APPOINTMENT OF FOURTY-ONE (41) JUDGES OF THE HIGH COURT AND THE COURT OF APPEAL**

The Committee considered the draft Report on the Request for Statement regarding the delay in appointment of forty-one (now forty) Judges of the High Court and the Court of Appeal, and made the following observations and recommendations for inclusion in the Report -

a) Delete the section that state, *"That the law be amended,"* and add that Article 259 sub-article 8, states that where the constitution does not provide a specific time, the office that is tasked with making a decision must do so within reasonable time. The delay in this case had been been unreasonable and went contrary to that clear provision of the constitution.
b) The Committee expressed discomfort in the lack of firmness in the Office of the Attorney General, and in the conflict that arises from the Attorney General both sitting as a Member of the Judicial Service Commission and as an appellant in Court against the recommendation of the JSC.
c) The Committee noted that it was improper to have reports leaked on alleged impropriety of Judges while they were serving in office, without subjecting the same to a process of interrogation where the impugned Judges would be given the opportunity to respond. This further undermined the dispensation of justice.
d) The Committee reminds that the administration of justice has suffered and is unable to effectively function due to the failure by the President to appoint the Judges.
e) Article 27 of the Constitution granted to every person equality before the law and the right to equal protection and equal benefit of the law. The article further protected all persons against discrimination. In the present case, by appointing 34 Judges and leaving out the six nominees, the six had been unduly discriminated against.

f) Some of the Court stations that previously had a resident Court of Appeal no longer did, due to the shortage of Judges in that Court. This was also reflected in the recent judicial postings by the Chief Justice.
g) The act of not appointing the said Judges undermined their authority even in the offices where they continued to serve.
h) The Court Order issued by the High Court remained in place and no stay had been issued against implementation of the decision. The Executive was therefore in breach of the said Order.
i) The issue of the appointment of Judges not proceeding due to the pending suit at the Court of Appeal could no longer hold, as the 34 Judges had been appointed while the appeal was still in place.
j) Articles 2 and 10 of the Constitution ought to be cited in the Report, as they are foundational values which every state organ was obligated to uphold.

The Committee further observed that there was a lacuna in law on what ought to be done where a positive order was directed at the appointing authority and the said authority declined, refused, or otherwise failed to comply with such an order.

Thereupon, the Committee adopted the Report subject to the said amendments, having been proposed by Sen. James Orengo, EGH, SC, MP, and seconded by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 220/2021 REVIEW OF THE LEGAL, POLICY AND ADMINISTRATIVE FRAMEWORK ON THE FIGHT AGAINST CORRUPTION

The Committee was taken through the draft Report on the inquiry into the legal, policy and administrative framework in the fight against corruption in Kenya, and made the following observations –

a) That, the Multi-Agency Taskforce (MAT) continued to experience challenges due to conflicting and overlapping mandates as well as superiority fights among its members.
b) That some of the entities were misplaced within the structure of the MAT or in their establishing statutes. For instance, the Witness Protection Agency should ideally be under the Office of the Director of Public Prosecutions to effectively carry out its work. However, it was currently under the Office of the Attorney General. Also, the Asset Recovery Agency should ideally be an independent entity, but currently it operated within the Office of the Attorney General.
c) The fact that over 30 cases related to corruption had been withdrawn by the Director of Public Prosecutions, according to the Report shared with the Committee by the Ethics and Anti-Corruption Commission, demonstrated that there was no proper coordination among the members of the MAT during the investigative stage and on the decision whether to present the cases to Court.

Thereupon, having considered that the Committee had meetings scheduled with members of the MAT over the subsequent weeks, and further proposed to hold a retreat

with all members of the MAT in August, the Committee resolved to defer adoption of the Report until after the said meetings.

MIN. NO. 221/2021 ANY OTHER BUSINESS

The Committee noted that its meeting with the National Council for the Administration of Justice, on the Petition regarding access to justice during the COVID-19 pandemic did not proceed. Instead, the Chief Registrar/ Secretary, NCAJ had written indicating that there was a scheduling conflict where she was required to attend 3 meetings in Parliament on the same date. The Committee further noted that its letter to the NCAJ was sent on 18th June, while the other two letters were both dated 1st July. In that case, the Committee was of the view that the Chief Registrar should have honoured the invitation by the Committee and requested that the other two meetings be deferred.

Thereupon, the Committee resolved that a letter be sent to the Chief Registrar in this regard.

MIN. NO. 222/2021 ADJOURNMENT

There being no other business, the meeting was adjourned at 12.30 pm. The next meeting will be on Tuesday, 13th July, 2021 at 8.00 am.

SIGNED: .....

(CHAIRPERSON)

DATE: 29th July, 2021

TWELFTH PARLIAMENT | FIFTH SESSION

MINUTES OF THE THIRTY-THIRD SITTING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THE ZOOM ONLINE MEETING PLATFORM, ON WEDNESDAY, 26TH MAY, 2021 AT 8.20 A.M.

PRESENT

1. Sen. Erick Okong'o Mogeni, SC, MP - Chairperson (**Chairing**)
2. Sen. (Canon) Naomi Jillo Waqo, MP - Vice Chairperson
3. Sen. Mutula Kilonzo Junior, CBS, MP - Member
4. Sen. Johnson Sakaja, CBS, MP - Member

ABSENT WITH APOLOGY

1. Sen. Amos Wako, EGH, SC, FCIArb, MP - Member
2. Sen. James Orengo, EGH, SC, MP - Member
3. Sen. Fatuma Dullo, CBS, MP - Member
4. Sen. Irungu Kang'ata, CBS, MP - Member

OFFICE OF THE ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE

1. Hon. Justice (Rtd.) P. Kihara Kariuki - Attorney General
2. Mr. Kennedy Ogeto - Solicitor General
3. Ms. Mary Mugure - Ag. CEO, Council of Legal Education
4. Ms. Emily Chweya - Director, Legal Affairs
5. Mr. George Nyakundi - Commission Secretary, Advocates Complaints Commission and Member, Council of Legal Education
6. Ms. Flora Bidali - Ag. Executive Director, National Legal Aid Service
7. Ms. Sophie Sitati - Deputy Chief State Counsel
8. Mr. Clinton Mwita - Coordinator, Multi-Agency Taskforce Secretariat
9. Mr. Joshua Wabwire - Legal Adviser

SECRETARIAT

1. Mr. Charles Munyua - Clerk Assistant (*Taking minutes*)
2. Ms. Sylvia Nasambu - Clerk Assistant
3. Mr. Moses Kenyanchui - Legal Counsel
4. Mr. Said Osman - Research Officer
5. Ms. Lucianne Limo - Media Relations Officer
6. Mr. James Ngusya - Serjeant at Arms
7. Mr. James Kimiti - Hansard Officer
8. Ms. Tiffany Kiarie - Attachee

MIN. NO. 173/2021 PRAYER

The sitting commenced with a word of prayer by Sen. Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 174/2021 ADOPTION OF THE AGENDA

The Committee adopted the agenda of the Sitting, having been proposed by Sen. (Canon) Naomi Jillo Waqo, MP and seconded by Mutula Kilonzo Junior, CBS, MP.

MIN. NO. 175/2021 MEETING WITH THE ATTORNEY GENERAL TO DISCUSS VARIOUS LEGISLATIVE BUSINESS BEFORE THE COMMITTEE

Following introductions, the Committee proceeded to receive a presentation from the Attorney General and the Solicitor General on various legislative business before the Committee, as highlighted below –

a) Request for Statement on the delay in appointment of forty-one (now forty) Judges of the High Court and the Court of Appeal

Since the previous engagement between the Committee and the Office of the Attorney General, the AG had since filed the substantive appeal against the Judgment of the High Court directing H.E. the President to appoint Judges. The matter was pending filing of submissions by the other party and for the Court of Appeal to render its judgment on the matter.

The AG informed the Committee that it was important that the issue be determined by the Courts, and that his office was doing everything to have the matter expedited.

Thereupon, Members raised concern regarding the fact that there was no stay in place against implementation of the High Court ruling on the appointment of Judges; on the reputational risk that the continued non-appointment of the Judges posed to the affected judges; and on the slow pace at which the matter was proceeding at the Court of Appeal, compared to the speed with which other matters of great public interest were considered by the Courts.

b) Petition on mass examination failure at the Kenya School of Law

The Committee was updated on the status of implementation of the resolutions contained in the Report on the Taskforce on Legal Sector Reforms, and the KIPPRA Report on Factors Influencing Mass Examination Failure at the Kenya School of Law. Thereupon, the Committee was informed that legislative amendments had been drafted and would soon be submitted to Parliament proposing to, among others, allow the registration of other service providers for the Advocates Training Program.

Members were also informed that the fees charged by the Kenya School of Law and the Council for Legal Education were set out in legislation and regulations, which would need to be reviewed before the fees could be revised.

Thereupon, Members made the following observations –

a) That there was need for the Senior Counsel Caucus and the Law Society of Kenya to find a way of getting more senior lawyers involved in teaching at the Kenya School of Law, without necessarily increasing the budget of the KSL; and
b) There was need to harmonize the content taught at the Kenya School of Law vis-à-vis the examinations set by the Council of Legal Education.

c) Request for Statement on the operationalization of the Legal Aid Fund

The Committee was informed that the Legal Aid Fund, established under the Legal Aid Act, 2016, was yet to be operationalized due to –

i) lack of approvals from the State Corporations Advisory Committee, Salaries and Remuneration Commission, and Public Service Commission, for recruitment of professional, technical and support staff of the Service;
ii) delay by Parliament to approve the Legal Aid (General) Regulations, 2020; and
iii) ongoing development of regulations on how to establish and manage the Legal Aid Fund.

The Committee was further informed that several measures had been put in place to ensure the provision of legal aid to indigent persons, including establishment of a Board of the National Legal Aid Service, launch of the National Action Plan on Legal Aid (2017 – 2022), and the draft National Legal Aid Service Strategic Plan (2018 – 2022).

Members were further apprised on the transition plan put in place by the NLAS to establish offices across the country, and on the budgetary allocations and support received by the NLAS from development partners.

Thereupon, Members noted that there was need to do more to make legal aid available to indigent persons, particularly in marginalized communities and counties.

d) Inquiry by the Committee on the legislative, policy and administrative framework in the fight against corruption in Kenya

Upon deliberation, it was resolved that a retreat be scheduled between the Committee and the members of the Multi-Agency Team in the fight against corruption, to comprehensively review the legal and administrative frameworks in place, identify challenges, and propose legislative and other reforms to address the matter.

MIN. NO. 176/2021 ANY OTHER BUSINESS

A concern was raised regarding the protection available to potential witnesses at the investigative stage of a case, particularly in cases of extra-judicial killings and enforced disappearances which the Committee had been inquiring into.

Thereupon, it was resolved that a meeting be organized at a later date between the Committee and the Witness Protection Agency to deliberate on the matter.

MIN. NO. 177/2021 ADJOURNMENT

There being no other business, the Chairperson adjourned the meeting at 10.20 am. The next meeting will be held on Thursday, 27th May, 2021 at 8.00 am.

SIGNED: .....

(CHAIRPERSON)

DATE: 7th July, 2021

CORRIGENDA

IN Gazette Notice No. 516 of 2019, *amend* the expression printed as "Issue of a New Land Title Deed" to *read* "Opening of a New Land Register" where it appears.

IN Gazette Notice No. 12583 of 2018, *amend* the expression printed as "Cause No. 280 of 2018" to *read* "Cause No. 238 of 2018.

IN Gazette Notice No. 646 of 2019, Cause No. 1504 of 2018, *amend* the expression printed as "P.O. Box 5500–00200, Nairobi in Kenya" to *read* "P.O. Box 57500, Nairobi in Kenya".

IN Gazette Notice No. 13387 of 31st December, 2018, *amend* the phrases "Daniel Kipchumba" to *read* "Daniel Kipchumba Koech".

IN Gazette Notice No. 13239 of 2018, *amend* the phrases "Agriculture, Livestock, Fisheries and Irrigation" to *read* "The National Treasury and Planning" wherever they appear and further *amend* the name "Mwangi Kiunjuri" to *read* "Henry Rotich"

IN Gazette Notice No. 9722 of 2018, *amend* the phrases "Education" to *read* "Industry, Trade and Co-operatives" wherever they appear and further *amend* the name "Amina C. Mohamed" to *read* "Peter Munya"

GAZETTE NOTICE NO. 1419

THE NATIONAL DROUGHT MANAGEMENT AUTHORITY ACT

(*No.* 6 *of* 2016)

APPOINTMENT

IN EXERCISE of the powers conferred by section 8 (1) (*a*) of the National Drought Management Authority Act, I, Uhuru Kenyatta, President of the Republic of Kenya and Commander-in-Chief of the Defence Forces, appoint—

RAPHAEL MULLEI NZOMO

to be the Chairperson of the National Drought Management Authority Board, for a period of three (3) years, with effect from the 11th February 2019.

Dated the 11th of February, 2019.

UHURU KENYATTA,
President.

GAZETTE NOTICE NO. 1420

THE JUDICIAL SERVICE ACT

(*No.* 1 *of* 2011)

THE JUDICIARY

NOTICE OF VACANCIES IN THE OFFICE OF JUDGE OF THE COURT OF APPEAL (11 POSTS)

PURSUANT to section 3, Part II, First Schedule of the Judicial Service Act, 2011 the Judiciary declares eleven (11) vacancies in the Office of Judge of the Court of Appeal of Kenya.

Job Details:

Ref: V/No. 1/2019
Period of Service: As per Article 167 of the Constitution

Functions

A Judge of the Court of Appeal shall serve in the Court of Appeal of Kenya and shall exercise the following functions:

(a) To hear and determine Appeals from the High Court and

(b) To hear and determine appeals from any other court or Tribunals as prescribed by an Act of Parliament.

Constitutional and Statutory Requirements for Appointment:

For appointment to the position of Judge of the Court of Appeal, the applicant must possess the following minimum qualifications:

(a) Hold a law degree from a recognized university, or be an advocate of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction.

(b) Have at least ten (10) years' experience as a superior court judge irrespective of whether that experience was gained in Kenya or in another commonwealth common-law jurisdiction; or

(c) Have at least ten (10) years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field irrespective of whether that experience was gained in Kenya or in another commonwealth common-law jurisdiction ; or

(d) Have held the qualifications specified in paragraphs (*b*) and (*c*) for a period amounting, in aggregate, to ten (10) years.

(e) Have a high moral character, integrity and impartiality.

(f) Meet the requirements of Chapter Six of the Constitution on Leadership and integrity.

In addition, the applicants must demonstrate a high degree of professional competence, communication skills, fairness, good temperament, making of good judgments in both legal and life experiences and commitment to public and community service.

(*Note: Experience gained in Kenya or in another Commonwealth Country with a common law jurisdiction will be considered*)

The appointment shall be made in accordance with Article 166 (1) (*b*), (2) and (4) of the Constitution 2010 and the First Schedule of the Judicial Service Act, 2011.

Interested and qualified persons are asked to visit the JSC jobs portal: http://jobs.judiciary.go.ke for instructions on how to apply.

Dated the 17th January, 2019.

DAVID K. MARAGA,
Chief Justice and President of the Supreme Court of Kenya.

GAZETTE NOTICE NO. 1421

THE JUDICIAL SERVICE ACT

(*No.* 1 *of* 2011)

THE JUDICIARY

NOTICE OF VACANCIES IN THE OFFICE OF JUDGE OF THE ENVIRONMENT AND LAND COURT (20 POSTS)

PURSUANT to section 3, Part II, First Schedule of the Judicial Service Act, 2011 the Judiciary declares twenty (20) vacancies in the Office of Judge of the Environment and Land Court.

Job details:

Ref: V/No. 2/2019
Terms of Service: Constitutional Office
Period of Service: As per Article 167 of the Constitution

Functions:

A Judge of the Environment and Land Court shall serve in any Environment and Land Court station in Kenya and shall exercise the following functions:

(a) Have original and appellate jurisdiction to hear and determine all disputes relating to environment and the use and occupation of, and title to, land;

(b) Hear and determine disputes relating to:

(i) environmental planning and protection, trade, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and

(v) any other dispute relating to environment and land.

(c) Hear and determine applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(d) Exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

Constitutional and Statutory requirements for Appointment

For appointment to the position of Judge of the Environment and Land Court, applicants must possess the following minimum qualifications:

(a) Hold a law degree from a recognized university, or be an advocate of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction.

(b) Have at least ten (10) years' experience as a Superior Court Judge or professionally qualified Magistrate irrespective of whether that experience was gained in Kenya or in another commonwealth common-law jurisdiction; or

(c) Have at least ten (10) years' experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment and land or such experience in other relevant legal field irrespective of whether that experience was gained in Kenya or in another commonwealth common-law jurisdiction; or

(d) Have held the qualifications specified in paragraphs (b) and (c) for a period amounting, in aggregate, to ten (10) years.

(e) Have a high moral character, integrity and impartiality

(f) Meet the requirements of Chapter Six of the Constitution on Leadership and Integrity.

Notes:

(i) Experience gained in Kenya or in another Commonwealth Country with a common law jurisdiction will be considered.

(ii) Knowledge and experience in Environmental and Land matters will be an added advantage.

In addition, the applicants must demonstrate a high degree of professional competence, communication skills, fairness, good temperament, good judgment in both legal and life experiences and commitment to public and community service.

The appointments shall be made in accordance with Articles 166 (1) (*b*) (2) (5), 162 (2) (*b*), the First Schedule of the Judicial Service Act, No. 1 of 2011 and Section 7 of the Environment and Land Court Act, 2011.

Interested and qualified persons are asked to visit the JSC jobs portal: http://jobs.judiciary.go.ke for instructions on how to apply.

Dated the 17th January, 2019.

DAVID K. MARAGA,
Chief Justice and President of the Supreme Court of Kenya.

GAZETTE NOTICE NO. 1422

THE JUDICIAL SERVICE ACT

(*No.* 1 *of* 2011)

NOTICE OF VACANCIES IN THE OFFICE OF JUDGE OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (10 POSTS)

PURSUANT to Section 3, Part II, First Schedule of the Judicial Service Act, 2011 the Judiciary declares ten (10) vacancies in the Office of Judge of the Employment and Labour Relations Court.

Job details:

Ref:	V/No. 3/2019
Terms of Service:	Constitutional Office
Period of Service:	As per Article 167 of the Constitution

Functions:

A Judge of the Employment and Labour Relations Court shall serve in any Employment and Labour Relations Court station in Kenya and shall exercise the following functions:

(1) Have original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations including—

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade union's organisation;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

(2) Hear and determine appeals arising from—

(a) decisions of the Registrar of Trade Unions; and

(b) decisions of any other local tribunal or commission as may be prescribed under any written law

Constitutional Requirements for Appointment

For appointment to the position of Judge of the Employment and Labour Court, applicants must possess the following minimum qualifications:

(a) Hold a law degree from a recognized university, or be an advocate of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction.

(b) Have at least ten (10) years' experience as a Superior Court Judge or professionally qualified Magistrate irrespective of whether that experience was gained in Kenya or in another commonwealth common-law jurisdiction; or

(c) Have at least ten (10) years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field Magistrate irrespective of whether that experience was gained in Kenya or in another commonwealth common-law jurisdiction; or

(d) Have held the qualifications specified in paragraphs (b) and (c) for a period amounting, in aggregate, to ten (10) years.

(e) Have a high moral character, integrity and impartiality

(f) Meet the requirements of Chapter Six of the Constitution on Leadership and Intercity.

Notes:

(i) Experience gained in Kenya or in another Commonwealth Country with a common law jurisdiction will be considered.

(ii) Knowledge and experience in Employment and Labour Relations will be an added advantage.

In addition, the applicants must demonstrate a high degree of professional competence, communication skills, fairness, good temperament, good judgment in both legal and life experiences and commitment to public and community service.

The appointments shall be made in accordance with Articles 166 (1) (*b*) (2) (5), 162 (2) (*a*) and the First Schedule of the Judicial Service Act, 2011.

Dated the 17th January, 2019.

DAVID K. MARAGA,
Chief Justice and President of the Supreme Court of Kenya.

JUDICIAL SERVICE COMMISSION

REPUBLIC OF KENYA

VACANCIES ANNOUNCEMENT

Following the declaration of vacancies in the offices of; **Judge of Court of Appeal, Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Court** vide **Gazette Notices No. 1420, 1421 and 1422 of 15th February 2019**, the Judicial Service Commission pursuant to **Article 172(1)(a)** as read with **Articles 166 (1)(b) (2) (4) and 162(2) (a) and (b) of the Constitution of Kenya 2010** and the **First Schedule of the Judicial Service Act, No. 1 of 2011**, invites applications from qualified persons to fill the vacancies, indicated in the matrix below:-

S/NO	JOB TITLE	REF NO.	NO OF VACANCIES
1.	Judge of the Court of Appeal	V/No. 1/2019	Eleven (11) posts
2.	Judge of the Environment and Land Court	V/No. 2/2019	Twenty (20) posts
3.	Judge of the Employment and Labour Relations Court	V/No. 3/2019	Ten (10) posts

Interested and qualified persons may visit the Commission's jobs portal: **jobs.judiciary.go.ke**. for detailed job description, requirements for appointment and instructions on how to apply. All applications should reach the Commission **NOT LATER THAN 18TH MARCH, 2019 AT 5.00 P.M.**

Only shortlisted candidates will be contacted.

Canvassing in any form will lead to automatic disqualification.

The Judicial Service Commission is an Equal Opportunity Employer and selects candidates on merit through fair and open competition from the widest range of eligible candidates.

THE SECRETARY
JUDICIAL SERVICE COMMISSION
P.O. BOX 40048 - 00100 NAIROBI
E-mail: jscsecretariat@jsc.go.ke
Commission Secretariat: Reinsurance Plaza,
Podium Floor, Taifa Road,
Nairobi.

www.jsc.go.ke

JSC statement on persons recommended to the President for appointment as Judges of the Court of Appeal

By July 22, 2019 Headlines, Inside The Judiciary, Internal News, Intranet Headline, JSC Updates, Main Headline, News, News from Court Stations, News Headline, NewsItems

JSC STATEMENT. NAIROBI, JULY 22, 2019

Preamble

The Court of Appeal is established under Article 164 (1) of the Constitution. It has jurisdiction to hear appeals from the High Court, environment & Land Court, Employment& Labour Relations Court and any other court or tribunal as prescribed by an Act of Parliament. The Court has an establishment of 30 judges.

On 6th August 2018, the President of the Court of Appeal placed a request before JSC to fill **11** vacancies in order to raise the number of judges from the current **19** to the full complement of **30** judges. Pursuant to Article 172 (a) which

mandates the JSC to "*recommend to the President persons for appointment as judges*," the Commission obliged and declared 11 vacancies in the Office of the Judge of the Court of Appeal vide Gazette Notice No 1420 dated February 15, 2019.

The shortlisting and interview process

Following advertisements of the vacancies placed in the *Daily Nation* and *The Standard* of February 22 2019, **113** applications were received from whom 35 candidates were shortlisted. The full list of applicants as well as the shortlisted candidates was once again published in the newspapers.

The Commission subsequently interviewed the 35 candidates in an exercise that was open to the public, including the media, from June 17 until June 27, 2019. The Commission wishes to thank all the candidates who applied and particularly those who attended the interviews. Thank you too Kenyans for the feedback on the candidates, and all the organizations that participated in the vetting process.

The results

All the interviewed candidates performed very well.

Having deliberated and considered all the necessary parameters, the Commission has concluded that the following are the most suitable candidates to be recommended for appointment in accordance with Part III of the First Schedule of the Judicial Service Act.

1	HON. MR. JUSTICE TUIYOTT FRANCIS
2	HON. LADY JUSTICE OMONDI HELLEN AMOLO
3	HON. LADY JUSTICE NYAMWEYA PAULINE
4	HON. MR. JUSTICE KORIR WELDON KIPYEGON
5	HON. MR. JUSTICE MSAGHA A. MBOGHOLI
6	HON. MR.JUSTICE MUCHELULE AGGREY OTSYULA
7	DR. KIBAYA IMAANA LAIBUTA
8	HON. LADY JUSTICE LESIIT JESSIE WANJIKU

9	HON. LADY JUSTICE NGUGI GRACE MUMBI
10	HON. MR. JUSTICE ODUNGA GEORGE VINCENT
11	HON. MR.JUSTICE JOEL MWAURA NGUGI

The Commission will forthwith forward the names to the President for appointment.

ISSUED BY JUDICIAL SERVICE COMMISSION

-

REPUBLIC OF KENYA

JUDICIAL SERVICE COMMISSION
REINSURANCE PLAZA,
PODIUM FLOOR, TAIFA RD
P. O. BOX 40048-00100
NAIROBI

Telephone:Nairobi
2731980

Email:
jscsecretariat@jsc.go.ke

When replying please quote:

PRESS STATEMENT ON PERSONS RECOMMENDED TO THE PRESIDENT FOR APPOINTMENT AS JUDGES OF THE ENVIRONMENT AND LAND COURT (ELC) AND THE EMPLOYMENT AND LABOUR RELATIONS COURT (ELRC)

NAIROBI, AUGUST 13, 2019

Preamble

Pursuant to Article 172 (a) which mandates the JSC to "*recommend to the President persons for appointment as judges*," the Commission on February 2, 2019 vide the Kenya Gazette declared **20** vacancies in the Office of the Judge of **The Environment and Land Court (ELC)** and **10** vacancies in **The Employment and Labour Relations Court (ELRC)**. This was done by way of Gazette notices no. 1421 and 1422 respectively.

The Environment and Land Court (ELC)

The Environment and Land Court (ELC) is established under Article 162 (2) of the Constitution. It has the same status as the High Court and has exclusive original and appellate jurisdiction to hear and determine environment and land related disputes as guided by the Environment and Land Court Act No 19 of 2011.

The court consists such number of judges as may be determined by the Judicial Service Commission. Presently it has 33 Judges sitting in 26 counties.

The Employment and Labour Relations Court (ELRC)

The ELRC Court is also a specialised court with the status of the High Court. It was operationalised by the Employment and Labour Relations Court Act No. 20 of 2011.

The Court has original and appellate jurisdiction to hear and determine all disputes relating to employment and labour relations.

The shortlisting and interview process

Following advertisements of the vacancies placed in the *Daily Nation* and *The Standard* on February 22, 2019, a total of **229** applications were received for the Environment

and Land Court and **160** applications for the Employment and Labour Relations Court, out of which **63** and **29** candidates were respectively shortlisted. The full list of applicants as well as the shortlisted candidates was once again published in the newspapers.

The Commission subsequently interviewed the candidates in an exercise that was open to the public, including the media, from 9th July to 8th August, 2019. The interviews were also streamed live through the JSC social media accounts.

The Commission wishes to thank all candidates who applied and particularly those who attended the interviews. We also thank Kenyans who participated in the vetting process.

The results

Having taken into account the Constitutional and statutory parameters, the Commission recommends the following persons for appointment as Judges.

Judges of the Environment and Land Court

1	Mboya Oguttu Joseph
2	Naikuni Lucas Leperes
3	Mwanyale Micheal Ngolo
4	Makori Evans Kiago
5	Addraya Eda Dena
6	Kimani Lilian Gathoni
7	Kamau Joseph Mugo
8	Wabwoto Karoph Edward
9	Koross Anne Yatich Kipingor
10	Gicheru Maxwell Nduiga
11	Mogeni Ann Jacqueline Akhalemesi Anam
12	Ongarora Fred Nyagaka
13	Christopher Kyania Nzili
14	Mugo David Mwangi
15	Cheruiyot Judith Elizabeth Omange
16	Omollo Lynette Achieng'
17	Washe Emmanuel Mutwana
18	Nyukuri Annet
19	Murigi Theresa Wairimu
20	Asati Esther

Judges of the Employment and Labour Relations Court

1	Gakeri Jacob Kariuki
2	Baari Christine Noontatua
3	Keli Jemimah Wanza
4	Mwaure Anna Ngibuini
5	Matanga Bernard Odongo Manani

6	**Rutto Chemtai Stella**
7	**Kebira Ocharo**
8	**Okeche Harrison Ogweno**
9	**Kitiku Agnes Mueni-Nzei**
10	**Nderitu David Njagi**

The Commission will forthwith forward the names to H.E. the President for appointment.

DATED this 13TH day of August 2019

Hon. Mr. Justice David K. Maraga, EGH

CHIEF JUSTICE AND CHAIRMAN - JSC

DDLPS
Forwarded for Consideration
G.O 5/5/20

(2) DC(MA)
Submitted for further procession
5/5/20

REPUBLIC OF KENYA

TWELFTH PARLIAMENT – (FOURTH SESSION)

THE SENATE

(3) The Clerk
For approval.
5/5/20

REQUEST FOR STATEMENT

REQUEST FOR A STATEMENT ON THE DELAY IN APPOINTMENT OF JUDGES IN HIGH COURT AND COURT OF APPEAL

Mr. Speaker, Sir,

I rise pursuant, to Standing Order 48(1), to seek a Statement from the Standing Committee on Justice, Human Rights and Legal Affairs regarding the delay in appointment of fourty one (41) Judges in the High Court and Court of Appeal.

In the Statement, the Committee should :-

1. Explain the reason(s) for the delay in gazettement of the fourty one (41) Judges;

2. Explain the continued failure to effect the recommendations of the Judicial Service Commission thus occasioning the violations of fundamental rights of persons designate as judges of the Court of Appeal;

3. Explain the continued failure by the Executive to obey Court Orders and the Judgement delivered on 6th February 2020, hence jeopardizing the administration of justice; and

4. State when the gazettement of the said Judges is to be done in order to beat the backlog experienced in the Courts.

Signed: _____

MUTULA KILONZO JUNIOR
MAKUENI COUNTY

(4) Hon. Speaker
For any approval.
5/5/20

Date: 5/5/2020

DELAY IN APPOINTMENT OF 41 JUDGES FOR THE HIGH COURT AND THE COURT OF APPEAL

Sen. Mutula Kilonzo Jnr.: Thank you, Mr. Speaker, Sir. I rise pursuant to Standing Order No.41 to seek a Statement from the Standing Committee on Justice, Legal Affairs and Human Rights regarding the delay in appointment of 41 judges for the High Court and the Court of Appeal.

In the Statement, the Committee should-

(i) Explain the reasons for the delay in gazettement of the 41 judges;

(ii) Explain the continued failure to effect the recommendations of the Judicial Service Commission (JSC) thus occasioning violations of fundamental rights of persons designated as judges of the Court of Appeal;

(iii) Explain the continued failure by the Executive to obey court orders under a judgment delivered on 6th February, 2020; hence jeopardizing the administration on justice; and,

(iv) State when the gazettement of the said judges is to be done in order to beat the backlog experienced in courts.

The Speaker (Hon. Lusaka): Sen. Orengo, proceed.

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, I support this Statement.

The last component of that Statement is very important. It is on the question of compliance with court orders. One of the fundamental provisions of the Constitution is the rule of law. The moment a Government does not comply with or obey the court orders that Government could not sit and preside over the affairs of a constitutionally or democratically elected Government.

I sit in that Committee with Sen. Mutula Kilonzo Jnr. we should come out with a firm answer. That answer should come from the top to tell us why it is so difficult to comply with court orders. This is primary. How can you ask a policeman like we have been complaining about eviction that they are being carried by police officers. If the police officers are required to comply with legal court orders, how can you expect them to undertake faithfully their work under the principle of the rule of law?

Mr. Speaker, Sir, finally, a country which cannot have judges is a banana republic. I am saying that without fear of contradiction. It is only in a banana republic where you cannot have a system of courts.

The Court of Appeal is the second ranking level of our court system. I am asking that this Committee should come out with answers. The last time we were very embarrassed as lawyers who appeared in court, which found Cabinet Secretaries (CSs) not being compliant with court orders. They were sentenced. If we were in a country of a rule of law, they would not be serving.

I said in this House that when we are talking about these court orders and the rule of law, they will not look at us in the eye. Now they are facing the music.

I want Sen. Kihika to look at me in the eye. You are the Whip of a ruling party. You cannot be crying. Give us those answers. We do not need even to go to State House. You should provide us with answers.

As a Chairperson of committees and the leadership of the side opposite, we should come out with these answers.

Mr. Speaker, Sir, I beg you that we should have these answers next week. Sen. Mutula Kilonzo Jnr., you are going to go very far in being in the frontline of fighting for the rule of law and democracy. My son, you will achieve the top.

(Laughter)

The Speaker (Hon. Lusaka): Today, there is some level of very good excitement in the House.

Proceed, Sen. Faki.

Sen. Faki: Thank you, Mr. Speaker, Sir, for giving me this to support the Statement by the Senator of Makueni County, Sen. Mutula Kilonzo Jnr. Court services have ground to a halt as a result of the delay in the appointment of these judges.

The Court of Appeal had branches in Mombasa, Nakuru and Kisumu counties. All of them have been disbanded and the court brought to Nairobi. It means that court services are no longer devolved. We have to spend a lot of money to come to Nairobi to access services of the Judiciary.

I beg that this Statement be dealt with as soon as possible because legal services are grinding to a halt in this country.

Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): The Committee should provide us with a response by Tuesday, next week.

ADJOURNMENT

The Speaker (Hon. Lusaka): Hon. Senators, it is now 6.30 p.m., time for interruption of the business of the Senate. The House, therefore, stands adjourned until Tuesday, 12th May, 2020, at 10.00 a.m.

The Senate rose at 6. 35 p.m.

REPUBLIC OF KENYA

Telegraphic Address
'Bunge', Nairobi
Telephone 2848000
Fax: 2243694
E-mail: csenate@parliament.go.ke

Clerk's Chambers
The Senate
Parliament Buildings
P. O. Box 41842 –00100
Nairobi, Kenya

PARLIAMENT

OFFICE OF THE CLERK OF THE SENATE/ SECRETARY, PARLIAMENTARY SERVICE COMMISSION

Ref. SEN./12/4/JLAHRC/2020(36) 7th May, 2020

Hon. Justice (Rtd) Paul Kihara Kariuki, EGH,
The Attorney General,
State Law Office and Department of Justice,
Sheria House, Harambee Avenue,
P.O. Box 40112 - 00100,
NAIROBI.

Dear Sir,

RE: REQUEST FOR RESPONSE TO A STATEMENT ON THE DELAY IN APPOINTMENT OF JUDGES OF THE HIGH COURT AND THE COURT OF APPEAL

The Senate Standing Committee on Justice, Legal Affairs and Human Rights is established under standing order 218 (3) of the Standing Orders of the Senate and is mandated to inter alia-

> *'Consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and, implementation of the provisions of the Constitution on human rights.'*

Standing order 48 (1) provides that a Senator may request for a Statement from a Committee on any matter under the mandate of the Committee.

Pursuant to this provision, at the Sitting of the Senate held on Tuesday, 5th May, 2020, the Senator for Makueni County, Sen. Mutula Kilonzo Junior, MP requested for a statement from the Standing Committee on Justice, Legal Affairs and Human Rights, regarding the delay in appointment of Judges of the High Court and the Court of Appeal.

In the Statement, the Senator sought the following information: -

i) Explain the reason(s) for the delay in gazettement of the forty-one (41) Judges [nominated by the Judicial Service Commission];

ii) Explain the continued failure to effect the recommendations of the Judicial Service Commission, thus occasioning the violation of fundamental rights of persons designated as Judges of the High Court and the Court of Appeal;

iii) Explain the continued failure by the Executive to obey Court Orders and the Judgment delivered on 6th February, 2020, hence jeopardizing the administration of justice; and

iv) State when the gazettement of the said Judges is to be done in order to beat the backlog experienced in the Courts.

Standing order 48(3)(b) provides that the Committee may invite the Senator who requested the Statement, the relevant Cabinet Secretary and any other person the Committee deems necessary during deliberation on the Statement.

The purpose of this letter is therefore to request that you submit a written response to the Statement sought by Sen. Mutula Kilonzo Junior, MP, on or before **Friday, 15th May, 2020**, at **5.00 pm**, on the address: csenate@parliament.go.ke.

Attached is a copy of the Request for Statement, and an extract of the Hansard of the Plenary Session of the Senate held on Tuesday, 5th May, 2020 for your information.

Mr. Charles Munyua, Clerk Assistant (Cell Number - 0720250607, Email - covid19@parliament.go.ke), is the Clerk to the Committee and is responsible for all arrangements relating to this matter.

Yours faithfully,

FDI. E/=

J. M. NYEGENYE, CBS,
CLERK OF THE SENATE/ SECRETARY,
PARLIAMENTARY SERVICE COMMISSION.

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

AG/LDD/685/1/10

1st September, 2020

Mr. J.M. Nyegenye CBS
Clerk of the Senate
Clerk's Chambers
Parliament Buildings
P.O. Box 41842
NAIROBI

RE: INVITATION TO A MEETING OF THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

This has refernce to your letter dated the 17th August, 2020, regarding the Jusice, Legal Affairs and Human Rights Committee's invitation to submit comments on:

(a) The Government Contracts Bill (National Assembly Bill No. 9 of 2018)
(b) Request for statement on the delay in appointment of forty-one judges nominated by the Judicial Service Commission for appointment in the High Court and Court of Appeal
(c) Request for statement on the compulsory management of copyright and other related rights
(d) The administrative, legislative and policy framework in the fight against corruption in Kenya
(e) Petition on alleged mass examination failure at the Kenya School of Law

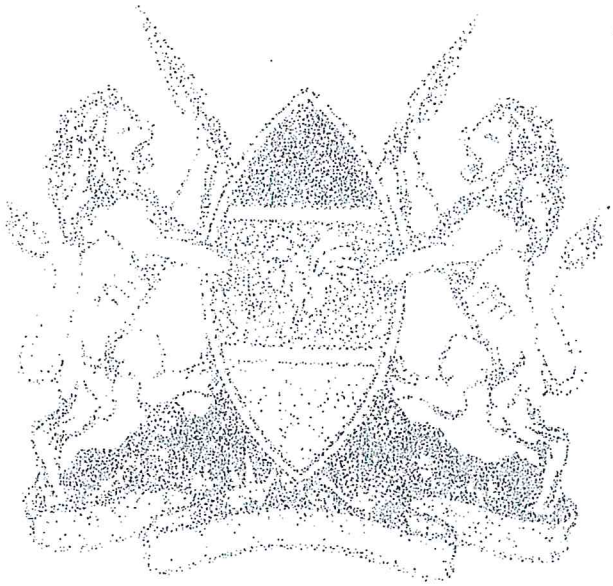
Kindly find annexed hereto our comprehensive comments on the aforementioned matters for the Committee's consideration and further necessary action.

KENNEDY OGETO CBS
SOLICITOR GENERAL

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2251355/0711945555/0732529995
E-MAIL: info.statelawoffice@kenya.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUEP.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke

Copy to: **Hon. P. Kihara Kariuki EGH**
Attorney General



(a) The President ordered the establishment of an ICT system to create a system to undertake registration of Copyright, collect and distribute royalties and monitor the use of the music in the media for facilitating end-to-end transparency in the management of Collective Management Organisations.

(b) This is to report that three of the four modules:

(i) The National Rights Registry System
(ii) Royalty Collection
(iii) The Royalty distribution module are ready and in use
(iv) The fourth module, to tackle lack of data linked distribution by undertaking Media monitoring is ready but undergoing data upload by the end of August 2020.

(c) The ICT system enables KECOBO to monitor proceeds paid into the joint CMO account and payment of royalties. However little income has been received by the CMOs because of the Covid-19. Other measures including a joint CMO account are already in place.

18. SKIZA PLATFORM

(a) Skiza is a platform/product of Safaricom Plc. The relationship involves contracts entered between the content owners, Content Service Providers and Safaricom Plc.

(b) The matter of determining terms of transactions is not within the statutory domain of the Kenya Copyright Board as it involves property rights exploitation.

(c) In this regard, the Communications Authority, the regulator that licenses both platform owner and the intermediary Content Service Providers is therefore better placed to respond on the other matters.

(d) However, the introduction of Excise Duty on Airtime last year had a significant impact as the income was already subject to Value Added Tax and withholding tax.

D. REQUEST FOR STATEMENT ON THE DELAY IN APPOINTMENT OF FORTY-ONE JUDGES NOMINATED BY THE JUDICIAL SERVICE COMMISSION FOR APPOINTMENT IN THE HIGH COURT AND COURT OF APPEAL

19. Vide a judgment delivered on 6th February, 2020 the Hon. Lady Justice Achode, Hon. Mr. Justice Makau and Hon. Mr. Justice Chacha Mwita of the High Court at Nairobi held in favour of the Petitioner and gave the following orders:

(a) A declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the 1st interested party in accordance with Article 166(1) as read with Article 172(1)(a) of the constitution on the persons to be appointed as judges.

(b) A declaration be and is hereby issued that the President's failure to appoint the persons recommended for appointment as judges violates the constitution and the Judicial Service Act.

(c) A declaration be and is hereby issued that the continued delay to appoint the persons recommended as judges of the respective courts is a violation of Articles 2 (1), 3 (1), 10, 73 (1) (a), 166 (1), 172 (1) (a) and 249 (2) of the Constitution.

20. It is important to note that the Court did not issue any injunctive orders against His Excellency the President directing him to do or refrain from doing anything; save for orders of costs the Court issued only declaratory orders.

21. On the Government's instructions the Honourable the Attorney-General filed a notice of appeal against the judgment and orders of the Court on the 6th February, 2020 and sought to be supplied with typed copies of the Court's proceedings, a certified copy of the decree and judgment which are primary documents for purposes of lodging an appeal from the decision of the High Court to the Court of Appeal.

22. Subsequent to the judgment of the High Court, the Petitioner filed an application dated the 24th February 2020 seeking the following orders of the Court:

(a) That a finding be made that failure to appoint the persons recommended for appointment within 14 days the Respondent is in breach of the orders of this Court issued on the 6th February, 2020.

(b) That a finding be made that the appointments have fallen due upon the lapse of 14 days, and the appointing authority having failed to act as per the constitution, the appointments have legally ripened and crystallized.

(c) That the Respondent be directed to within 3 days publish for general information of the public in the Kenya *Gazette* the names of persons recommended for appointment as judges of the various courts.

(d) That in the event of failure by the respondents within 3 days to publish the names in the Kenya *Gazette*, the names of the persons be immediately published by the 1st interested party within 3 days in any newspaper of nationwide circulation.

(e) That, upon publication of such names, the 2nd Respondent to within 3 days administer oath of office in the manner and form prescribed by the third schedule to the constitution to the said persons.

(f) That the Chief Registrar of the Judiciary be directed to execute any document or legal instrument necessary for the full and proper assumption of office by the persons recommended for appointment.

(g) That the Controller of Budget be and is hereby authorized to approve withdrawal of funds from the consolidated fund to facilitate full and proper assumption of office by the said persons recommended for appointment as judges.

(h) That the Inspector General of National Police Service be directed to provide the requisite security arrangements for the full and proper assumption of office by the persons recommended for appointment.

23. The High Court dismissed the Applicant's application in its ruling delivered on 31st July, 2020. On 18th August 2020, the Attorney-General filed the substantive appeal to the decision of the High Court before the Court of Appeal being **Nairobi Civil Appeal No. 286 of 2020 Attorney-General -vs- Adrian Kamotho Njenga & 2 others**. Some of the grounds upon which the appeal is premised include:

(a) The learned judges erred by awarding the petitioner who was allegedly acting in the public interest costs of the petition to be paid by the very public on whose behalf he was allegedly acting for.

(b) The learned judges erred when they proceeded on a preconceived position that the President had delayed the appointment.

(c) The learned judges failed to consider whether in the circumstances of the case there had been a delay in the appointment of the persons recommended by the Judicial Service Commission to the President before the institution of the case.

(d) The learned judges erred by prescribing a time frame for appointment of persons recommended to the President for appointment by the Judicial Service Commission where none was prescribed in the Constitution.

(e) The learned judges exceeded their jurisdiction when they proceeded to prescribed a time frame for appointment where no such relief was sought for in the petition

(f) The learned judges erred in finding that the Judicial Service Commission was under no obligation to consult and co-ordinate with other state entities while carrying out its functions.

(g) The learned judges erred in finding that the recommendations by the Judicial Service Commission of persons to be appointed as judges was absolute and could not be challenged either in Court or be reviewed by the Judicial Service Commission under any circumstances other than those specified under the Judicial Service Act.

(h) The learned judges erred in finding that the principle of checks and balances was not applicable as regards the Judicial Service Commission and that the recommendation of the Judicial Service Commission was absolute.

(i) The learned judges erred in finding that the Judicial Service Commission was not subject to the principle of public participation in arriving at a particular number of judges to be appointed to the respective courts.

(j) The learned judges erred in finding that the sole input of the President of the Court of Appeal was all that was required to meet the requirement for public participation and consultation in arriving at an appropriate number of judges for appointment to the Court of Appeal.

(k) The learned judges failed to consider the provisions of the First Schedule to the Judicial Service Commission Act and thereby arrived at a wrong determination of the matters in issue.

(l) The learned judges erred when they failed to find that the Judicial Service Commission was under a statutory obligation to conduct a judicial needs assessment as provided under section 4 (3) of the Court of Appeal (Organization and Administration) Act.

(m) The learned judges erred when they failed to find that the Judicial Service Commission was under a constitutional obligation to provide the President with the report on the judicial needs assessment as provided under Article 254 of the Constitution.

(n) The learned Judges erred when they failed to find that the Judicial Service Commission neither conducted nor furnished the President with the judicial needs assessment as required by law.

(o) The learned judges erred when they found that the reports by the National Intelligence Service were not subject to the provisions of section 37 of the National Intelligence Service Act.

(p) That the learned judges failed to consider other provisions of the constitution dealing with the nomination, appointment, removal, remuneration of judges and thereby arrived at a wrong interpretation

(q) That the learned judges erred when they failed to consider the provisions of the previous constitution on the appointment procedure for judges to discern the purpose of the provisions of the current constitution on the same.

(r) That the learned judges erred in not appreciating that the procedure for appointment of judges in the constitution ascribes to a model for appointment of judges which is not unique to Kenya.

(s) That the learned judges failed to consider comparative law on the applicability of the appointment model for judges adopted in the constitution of Kenya.

(t) The learned judges failed to appreciate the bifurcation of the process of selection and appointment of judges and the vesting of the same into two distinct state entities

(u) The learned judges erred in their construing of the relevant provisions of the constitution thereby arriving at an interpretation of the constitution that leads to institutional tyranny.

(v) That the learned judges erred in their finding that the President's role in appointment process of judges was purely ceremonial/facilitative.

(w) That the learned judges failed to consider the provisions of the constitution that deal with the duties and obligations of the President in respect to the appointment and removal of state officers including judges.

(x) That the learned judges failed to consider that the power to appoint judges by the President is one of the functions that cannot be performed during the temporary incumbency of a President therefore cannot be properly said to be a ceremonial/facilitative function.

(y) The learned judges erred when they failed to appreciate the applicability of the provisions of Article 10 of the constitution to the President's role in the appointment of judges.

24. The matter is now actively before the Court of Appeal, the merits or otherwise of the appeal may not be subject of discussion before the August House by dint of the doctrine of sub-judice that is expressly recognized by this House in its standing orders.

25. In conclusion it is worth noting that in constitutional matters, parties have the right to appeal to the Supreme Court as a matter of right and the determination by either the High Court or Court of Appeal in a matter is subject to the final determination by the Supreme Court.

E. THE ADMINISTRATIVE, POLICY AND LEGISLATIVE FRAMEWORK IN THE FIGHT AGAINST CORRUPTION IN KENYA

26. It had been noted that the lack of synergy and inter-agency co-operation among law enforcement agencies was compromising the fight against corruption, economic crimes and other related crimes. The Multi Agency Team (MAT) operates within the framework of the 3 Cs (Co-ordination, Collaboration and Co-operation) which informed the unity of purpose upon which the MAT was established. The co-ordination framework recognizes the distinct mandates of the entities under the MAT, but with the strategic intent

REPUBLIC OF KENYA

Telegraphic Address
'Bunge', Nairobi
Telephone 2848000
Fax: 2243694
E-mail: csenate@parliament.go.ke

Clerk's Chambers
The Senate
Parliament Buildings
P. O. Box 41842 –00100
Nairobi, Kenya

PARLIAMENT
OFFICE OF THE CLERK OF THE SENATE

Ref. SEN./12/5/JLAHRC/2021(10) 10th May, 2021

Ms. Anne Amadi, CBS,
Chief Registrar of the Judiciary/
Secretary, National Council on the Administration of Justice,
Supreme Court Building, City Hall Way,
P.O. Box 30041 – 00100,
NAIROBI.
Email: chiefregistrar@court.go.ke

Dear Madam,

RE: INVITATION TO A MEETING WITH THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

The Senate Standing Committee on Justice, Legal Affairs and Human Rights is established under standing order 218 (3) of the Senate Standing Orders and is mandated to, inter alia-

> *'consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and, implementation of the provisions of the Constitution on human rights.'*

At its 26th Sitting held on Wednesday, 5th May, 2021, the Committee resolved to invite you to appear before the Committee on **Tuesday, 18th May, 2021 at 8.00 am**, to discuss -

a) The Statement sought by Sen. Mutula Kilonzo Junior, MP, on the delays in the appointment of forty-one (now forty) Judges of the High Court and the Court of Appeal (*copy attached*). On this, the Committee is interested in understanding –
   i) the impact of the said delay in appointment of judges on the operations of the High Court and Court of Appeal and on the administration of justice; and
   ii) the efforts being undertaken to resolve the impasse;

b) The State of the Judiciary and the Administration of Justice Annual Reports for 2018/2019 and 2019/2020.

The meeting will be held on the Zoom online meeting platform and a secure link will be shared with your office ahead of the sitting. You may be accompanied to the meeting by any officers you deem necessary to assist you in responding to the information sought by the Committee.

We request that any documentation to be referred to during the meeting be submitted on or before **Monday, 17th May, 2021** at **5.00 pm**. The documents may be sent **by email** on the address: csenate@parliament.go.ke and copied to senatejlahrc@gmail.com.

Mr. Charles Munyua, Clerk Assistant (Cell Number – 0720250607, Email - munyuacm@gmail.com), is the Clerk to the Committee and is responsible for all arrangements relating to this matter.

Yours faithfully,

For: EG

J. M. NYEGENYE, CBS,
CLERK OF THE SENATE.

Copy to:

Sen. Mutula Kilonzo Junior, CBS, MP,
Senator for Makueni County,
Parliament Buildings,
NAIROBI.

SPECIAL ISSUE

THE KENYA GAZETTE

Published by Authority of the Republic of Kenya

(Registered as a Newspaper at the G.P.O.)

Vol. CXXIII—No. 124 **NAIROBI, 3rd June, 2021** **Price Sh. 60**

GAZETTE NOTICE NO. 5233

THE CONSTITUTION OF KENYA

APPOINTMENT OF JUDGES OF THE COURT OF APPEAL

IN EXERCISE of the powers conferred by Article 166 (1) (*b*) of the Constitution of Kenya, I, Uhuru Kenyatta, President and Commander-in-Chief of the Kenya Defence Forces, appoint—

Msagha Amraphael Mbogholi,
Omondi Hellen Amollo,
Ngugi Grace Mumbi,
Francis Tuiyott,
Nyamweya Pauline Nyaboke,
Lesiit Jessie,
Kibaya Imaana Laibuta (Dr.),

to be Judges of the Court of Appeal.

Dated the 3rd June, 2021.

UHURU KENYATTA,
President.

GAZETTE NOTICE NO. 5234

THE CONSTITUTION OF KENYA

APPOINTMENT OF JUDGES OF THE EMPLOYMENT AND LABOUR RELATIONS COURT

IN EXERCISE of the powers conferred by Article 166 (1) (*b*) of the Constitution of Kenya, I, Uhuru Kenyatta, President and Commander-in-Chief of the Kenya Defence Forces, appoint—

Baari Christine Noontatua,
Gakeri Jacob Kariuki,
Keli Jemima Wanza,
Mwaure Ann Ngibuini,
Matanga Bernard Odongo Manani,
Rutto Stella Chemtai,
Kebira Ocharo,
Kitiku Agnes Mueni-Nzei,
Nderitu David Njagi,

to be Judges of the Employment and Labour Relations Court.

Dated the 3rd June, 2021.

UHURU KENYATTA,
President.

GAZETTE NOTICE NO. 5235

THE CONSTITUTION OF KENYA

APPOINTMENT OF JUDGES OF THE ENVIRONMENT AND LAND COURT

IN EXERCISE of the powers conferred by Article 166 (1) (*b*) of the Constitution of Kenya, I, Uhuru Kenyatta, President and Commander-in-Chief of the Kenya Defence Forces, appoint—

Mboya Oguttu Joseph,
Naikuni Lucas Leperes,
Mwanyale Michael Ngolo,
Addraya Edda Dena,
Kimani Lilian Gathoni,
Kamau Joseph Mugo,
Wabwoto Karoph Edward,
Koross Anne Yatich Kipingor,
Gicheru Maxwell Nduiga,
Mogeni Ann Jacqueline Akhalemesi,
Ongarora Fred Nyagaka,
Christopher Kyania Nzili,
Mugo David Mwangi,
Omollo Lynette Achieng',
Washe Emmanuel Mutwana,
Nyukuri Annet,
Murigi Theresa Wairimu,
Asati Esther,

to be Judges of the Environment and Land Court.

Dated the 3rd June, 2021.

UHURU KENYATTA,
President.

PRINTED AND PUBLISHED BY THE GOVERNMENT PRINTER, NAIROBI

KENYA LAW
Where Legal Information is Public Knowledge

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 369 OF 2019

ADRIAN KAMOTHO NJENGA……PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL……..RESPONDENT

AND

JUDICIAL SERVICE COMMISSION……1ST INTERESTED PARTY

THE HON. CHIEF JUSTICE AND

PRESIDENT OF THE SUPREME COURT……2ND INTERESTED PARTY

LAW SOCIETY OF KENYA……3RD INTERESTED PARTY

JUDGMENT

Introduction

1. This is the second time in the short history of our 2010 Constitution that this Court is being called upon to resolve a stalemate between the President, a State officer, and the Judicial Service Commission, a State organ, over the appointment of judges to superior courts. The first dispute arose in 2014 and now the current stalemate, five years later.

2. On 23rd July and 13th August 2019, the Judicial Service Commission, recommended persons for appointment as judges of the Court of Appeal, Environment and Land Court, and Employment and Labour Relations Court, and forwarded the names to the President for appointment as required by the Constitution and the **Judicial Service Act**. However, the President has not appointed them.

3. Adrian Kamotho Njenga, the Petitioner, a citizen and a public interest litigant, has filed a Petition dated 18th September, 2019 against the Attorney General, the principal advisor and legal representative to the National Government in civil matters, the Respondent, to have the stalemate resolved. He has joined in the petition, the Judicial Service Commission, a constitutional Commission established under **Article 172 (1)** of the **Constitution,** whose mandate is to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice, the 1st Interested Party. The petitioner has also joined the Chief Justice and President of the Supreme Court of Kenya, who is head of the Judiciary, and the chairperson of the 1st Interested Party, as the 2nd Interested Party, and The Law Society of Kenya, a statutory body established under

section 3(1) of the **Law Society of Kenya Act**, with the mandate to uphold the Constitution and advance the rule of law and the administration of justice, and protect and assist members of the public in matters relating to, or ancillary and incidental to the law, as the 3rd Interested Party.

The petition

4. The Petitioner avers in the petition and deposes in his supporting affidavit sworn on 18th September 2019, that the Petition has been brought in recognition of his obligation to defend the Constitution and the rule of Law in Kenya. He states that vide **Kenya Gazette Notice Nos. 1420, 1421** and **1422** of 15th February, 2019, the 2nd Interested Party, as head of the Judiciary, declared vacancies in the office of Judge of the Court of Appeal, Judge of the Environment and Land Court (**ELC**) and Judge of the Employment and Labour Relations Court (**ELRC**).

5. The 1st Interested Party then advertised the vacancies and called for applications from qualified interested persons within a set timeline. Upon the close of the period for applications, the 1st Interested Party reviewed the applications and published a list of applicants shortlisted for interviews for the respective declared vacancies.

6. The Petitioner states that the 1st Interested Party conducted interviews, and on 23rd July, 2019, recommended 11 persons for appointment as Judges of the Court of Appeal and forwarded the names to the President for formal appointment as required by **Article 166(1) (b)** of the **Constitution**. He further states that after concluding interviews for the **ELC** and **ELRC**, on 13th August 2018, the 1st Interested Party recommended for appointment as judges, 20 persons for the **ELC** and 10 persons for the **ELRC**, and forwarded the names to the President for formal appointment as required by **Article 166(1)(b)**.

7. It is the Petitioner's case that the President has not appointed the persons recommended by the 1st Interested Party to their positions as judges. According to the Petitioner, the President has failed to act within a reasonable time, in the performance of a critical constitutional function as required by the Constitution.

8. It is the Petitioner's view that a reasonable timeline for performing a constitutionally prescribed act is fourteen days. He states that failure to discharge a constitutional obligation within that period constitutes unreasonable and unjustifiable delay, given the urgent need to plug the extreme deficit of judges in the superior courts.

9. The Petitioner further avers, that the President's failure to effect the 1st Interested Party's recommendations violates his fundamental rights, those of persons designated as judges of the superior courts and the public at large, to proper administration of justice; that the action violates the principles of the rule of law, social justice, good governance, equality, transparency and accountability under **Article 10** of the **Constitution**. He also argues that the failure to appoint violates the wider citizenry's right of access to justice as guaranteed by **Article 48** of the **Constitution**.

10. The Petitioner states that the inordinate delay in appointing the persons recommended by the 1st Interested Party as judges of the superior courts, and the continued existence of vacancies in the office of the Judges of those courts, is weighing heavily and negatively on the administration of justice in the country. This, he argues, requires that the process of appointment be finalized with utmost urgency and without further delay.

11. The Petitioner blames the President for a discernible historical pattern of delay in the appointment of judges whenever recommended by the 1st Interested Party. This, he asserts, is oppressive to the designated judges and against public interest, thus it is a violation or threat to violate the Constitution.

12. The Petitioner has therefore sought the following reliefs:

1. A declaration that the President's failure to appoint the persons recommended for appointment as Judge of the Court of Appeal on 22nd July, 2019; Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Court on 13th August, 2019 violates Articles 1, 2(1), 3(1), 10, 47, 48, 73, 131(2), 166(1)(b) and 259(8) of the Constitution.

2. A declaration that having been duly recommended for appointment as required by the Constitution and the law, and the President having failed to appoint them as constitutionally mandated, the persons recommended for appointment as Judge of the

Court of Appeal on 22nd July, 2019; Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Court, on 13th August, 2019, are at liberty to assume office as Judge of the Court of Appeal, Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Courts respectively, as recommended by the Judicial Service Commission.

3. An order that the Respondent and the Interested Parties take immediate measures and/or steps to enable the persons recommended for appointment as Judge of the Court of Appeal on 22nd July, 2019; Judge of the Environment and Land Court and Judge of the Employment and Labour Relations Court, on 13th August, 2019 discharge their constitutional mandate.

4. Costs and *incidentals* be provided for.

5. Any other orders/reliefs that may be just and expedient.

The Petitioner's submissions

13. The Petitioner submits, relying on his affidavit sworn on 18th September, 2019 and his written submissions dated 11th October, 2019 in support of the Petition. He argues that the President's failure to appoint judges of the Superior Courts recommended by the 1st Interested Party, is a conspiracy to sabotage and frustrate the Judiciary in executing its constitutional mandate.

14. It is the Petitioner's submission that constitutional values and principles bind the President and failure to appoint the persons recommended as judges, violates their constitutional rights and the public right of access to justice. The Petitioner further argues that the delay in appointments relating to constitutional offices in the Judiciary has become a recurrent subject of public concern and is against pronouncements by the Court on the conduct of the process of appointment of judges of superior courts.

15. According to the Petitioner, the timeline within which to actualise appointments of judges as recommended by the 1st Interested Party has been settled, and should not be an issue anymore. He relies on the decision in ***Law Society of Kenya v Attorney General & 2 others, Petition No 313 of 2014 [2016] eKLR,*** to argue that the Respondent in that case who is the same Respondent in the present petition, having not appealed against that decision, the decision is binding and the President is acting in violation of that decision.

16. The Petitioner goes on to argue, that the persons recommended by the 1st Interested Party as Judges of the respective superior Courts, and whose names were forwarded to the President, should have been appointed without delay. According to him, the President's action to withhold the appointments has cost citizens irredeemable opportunity to have justice served; caused case backlog and continues to affect career progression of the persons recommended for appointment.

17. According to the Petitioner, by virtue of **Article 173(4)** of the **Constitution,** the Judiciary enjoys financial autonomy and the Respondent's claim that the Judiciary needed assurance in terms of budget from the Treasury before declaring the vacancies is a misapprehension of the Constitution. He submits that once the Judiciary's budgetary estimate is approved by Parliament, it becomes a charge on the Consolidated Fund, and is payable directly to the Judiciary. He argues that once approved, Treasury cannot dictate how the Judiciary uses its funds.

18. The Petitioner asserts that the 1st Interested Party is a diligent constitutional commission keen to execute its mandate, but is frustrated by the unjustifiable failure by the President to perform the final act of formalizing the appointments of persons recommended as judges of the superior courts.

19. The Petitioner contends that **Article 259(8)** of the **Constitution** is categorical that where a timeframe for performing a required act is not prescribed, the act should be done without unreasonable delay. He asserts that the apparent inordinate delay in the current circumstances, offends the letter and spirit of the Constitution and no justifiable reason can be advanced for the delay.

20. The Petitioner urges that the Court should entrench constitutionalism by fashioning innovative remedies to secure the values and principles set out in the Constitution. He cites the decision in ***Law Society of Kenya v Attorney General & another; Mohammed Abdulahi Warsame & another; Constitutional Petition No. 307 of 2018 [2019] eKLR,*** as an example where the court issued an appropriate order of mandamus to enable the 1st Interested Party therein to assume office as a Commissioner in order to perform his

constitutional duties.

21. To buttress his argument, the Petitioner also cites the decision of the Constitutional Court of South Africa in ***Minister of Health & others v Treatment Action Campaign & others [2002] ZACC 15; 2002(5) SA 721 BCLR (CC),*** which cited ***Fose v Minister of Safety & Security [1977] ZACC 6***. In those cases the court stated that courts may fashion appropriate relief which is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.

22. On jurisdiction, the Petitioner submits that jurisdiction is a preliminary issue, and therefore, the Respondent cannot accede to it only when it suits him. The Petitioner contends that the Respondent has prosecuted two similar Petitions before this court without raising the issue of jurisdiction. In his view, the question of constitutionality of the President's action falls squarely on this court.

23. The Petitioner urges that the instant Petition is an express challenge to arbitrary violation of the Constitution and a downright trampling of citizenry rights, and for that reason, the court should allow the petition with costs against the Respondent.

The 1st and 2nd Interested Parties' Case

24. Ms Anne Amadi, the Chief Registrar of the Judiciary and Secretary to the 1st Interested Party, made various depositions on behalf of the 1st and 2nd Interested Parties in an affidavit sworn on 4th November, 2019 in support of the Petition. The 1st and 2nd Interested Parties also filed written submissions dated and filed on 9th December, 2019 in support of the Petition.

25. In the replying affidavit, Ms Amadi outlines the procedure the 1st Interested Party followed to determine the persons it recommended to the President for appointment as Judges of the Court of Appeal, ELC and ELRC. She also deposes that although the 1st Interested Party received a letter from the National Intelligence Service (**NIS),** raising concerns about the suitability of some of the persons shortlisted for interviews, the **NIS** did not give details of the concerns and, therefore, the 1st Interested Party could not act on their letter without details which would have enabled those adversely mentioned to respond.

26. In their submissions, the 1st and 2nd Interested Parties submit that the 1st Interested Party is unique in its membership and composition; that the 1st Interested Party was designed by the framers of our Constitution to have representation from the Judiciary, Attorney General, two representatives appointed by the President to represent the public, a nominee of the Public Service Commission and representation from the statutory body responsible for professional regulation of advocates, to safeguard the independence of the Judiciary.

27. It is further submitted that under **Articles 248** and **249** of the **Constitution**, the 1st Interested Party is an independent constitutional Commission that is subject only to the Constitution and the law, and not subject to direction or control of any person or authority. It is stated that the 1st Interested Party is guided by **Article 252** of the **Constitution** which makes provisions for the general functions and powers of the Commissions and independent offices established by the Constitution.

28. Further submission is to the effect that under **Article 171(1) (a)** of the **Constitution**, the 1st Interested Party has the mandate to promote and facilitate the independence of the Judiciary and the efficient, transparent and effective administration of justice. It is argued that it is pursuant to this mandate that the 1st Interested Party recommends to the President, persons for appointment as judges.

29. It is the 1st and 2nd Interested Parties' case that there has been an acute shortage of Judges in the Court of Appeal, the ELC and the ELRC as detailed in the annual State of the Judiciary Reports filed before Parliament and presented to the President. According to the State of the Judiciary and the Administration of Justice Report **(SOJAR)** for 2017-2018, insufficient human resource capacity was flagged as one of challenges facing the Judiciary and, therefore, the need for human resource capacity improvement through hiring of optimal number of judges and magistrates.

30. It is their further case that the National Assembly Departmental Committee on Justice and Legal Affairs considered the 2017-2018 SOJAR and prepared a report dated 9th May 2019 titled ***"Report on the Consideration of the 2017/2018 Report of the Judiciary on State of the Judiciary and the Administration of Justice";*** observing that the current 32 judges in the ELC and the 12

judges in the ELRC are inadequate to expeditiously deal with the cases in those courts. It is urged that after considering the challenges faced by the Judiciary, the Committee recommended that the National Assembly and the National Treasury do allocate adequate resources to enable the Judiciary recruit additional Judges and Magistrates for the expeditious determination of cases.

31. The 1st and 2nd Interested Parties urge the court to consider that every citizen has the right of access to justice and judicial services throughout the Country as guaranteed under **Article 48** of the **Constitution**. They argue that in safeguarding this fundamental right, the Court should note that the decentralization of the Court of Appeal is vital in ensuring access to justice for litigants who exercise their right of appeal. Further that the **Judicial Service Act** contemplates the establishment of at least one High Court Station in each of the 47 counties, but nearly half of the counties do not have any High Court station currently.

32. According to the 1st and 2nd Interested Parties, by a letter dated 16th November, 2016, the 1st Interested Party requested the then President of the Court of Appeal, the current Respondent, to submit a paper on the number of judges in post and the optimal appointment against the workload in the Court of Appeal to inform the recruitment of new judges.

33. They submit that in his letter dated 23rd May, 2017, the Respondent, then the President of the Court of Appeal, wrote to the 1st Interested Party justifying the need to urgently appoint a minimum of six Judges to that Court given that between the years 2010 and 2017, 3 Judges of that court had retired; one was to retire in December 2017, and three other Judges of the Court were expected to retire in the next three years. At the time, the Court of Appeal had three stations outside Nairobi with three Judges posted to each station.

34. In this regard, the letter stated that there was need for a fourth Judge to be posted to each of the stations to enable those stations operate independently without having to rely on Nairobi in cases of recusals, indisposition or other factors which had resulted in failure to constitute benches to conduct proceedings.

35. The 1st and 2nd Interested Parties also referred to the "***Court of Appeal Performance Report for the 3rd & 4th Quarter 2018/2019 & 1st Quarter 2019/2020***", presented to the 1st Interested Party by the current President of the Court of Appeal on 15th October, 2019; noting that the Court of Appeal was operating with only 18 judges: that one judge retired in August 2019, another retired in October 2019 and one more was expected to retire by the end of 2019.

36. They submit that the report made it clear that by December 2019 that Court would have 15 judges against the minimum constitutional establishment of 12 and the maximum of 30 provided for in law. In the circumstances, they argue that the Court of Appeal has been unable to constitute a bench to hear cases in Nyeri, Meru, Busia, Eldoret, Nakuru and Kisii sub-registries leading to closure of those sub-registries.

37. It is further submitted that the "***Performance Report for the ELC Court 3rd & 4th Quarters 2018/19 and 1st Quarter 2019/20***" presented to the 1st Interested Party in January 2019 by the Presiding Judge of the ELC, requested it to consider appointment of more judges to boost the current number of judges serving in the 26 court stations throughout the country against a total case load of 20,435 cases. It is submitted that as at January 2019, there was a crisis in the ELC Division in Nairobi and as a result, judges were allocating hearing dates in 2020. This, they submit, demonstrates the dire need for more judges in that court.

38. The 1st and 2nd Interested Parties also refer to a progress report presented by the Principle Judge of the ELRC in January 2019. The report highlights the shortage of judges as the court's biggest challenge with only 12 judges serving the entire country. According to them, as at January 2019, that Court had a backlog of 9,309 cases countrywide. They also submit that in October 2019, the Principal Judge presented the 3rd and 4th Quarter Progress Report which confirmed that there was a shortage of judges in the court and that appointment of additional 10 judges would assist the court to reduce case backlog.

39. They further submit that the requests by the President of the Court of Appeal, Presiding Judge of the ELC and the Principal Judge ELRC were considered as well as the availability of resources before the declaration of 11 vacancies in the Court of Appeal, 20 vacancies in the ELC and 10 vacancies in the ELRC.

40. According to 1st and 2nd Interested Parties, a letter dated 16th April, 2018 forwarded to the National Assembly the ***Judiciary Programme Based Budget (PBB)*** for the MTEF period 2018/19 - 2020/21 and the ***Judiciary Recurrent Budget Estimates and Projects*** for the Financial Year 2018/2019. In the proposed budget estimates, the National Assembly was notified of the inadequate

number of Judicial Officers and staff which had hampered the expeditious disposal of cases; that the Judiciary required more resources to establish an additional 107 court stations across the country and recruit over 2000 judicial officers and staff. The National Treasury did not object to the proposal.

41. The 1st and 2nd Interested Parties assert that the 1st Interested Party complied with constitutional and statutory requirements before recommending the persons for appointment.

42. The 1st and 2nd Interested Parties, in particular, argue that Public Announcements were published on 18th April, 2019, requesting members of the public to submit any information of interest against any of the shortlisted applicants for consideration; that letters dated 29th April, 2019, were sent to various agencies, namely; Ethics and Anti-Corruption Commission; The National Intelligence Service; The Judiciary Ombudsman; The Kenya National Commission on Human Rights; The Advocates Complaints Commission; The Kenya Revenue Authority; Higher Education Loans Board; The Law Society of Kenya; Sheria Sacco Limited and The Law Society of Kenya Sacco, requesting for information and background checks on all the shortlisted applicants for the vacancies in the various courts.

43. It is further submitted that the 1st Interested Party considered and deliberated on all the reports and information received from members of the public and state agencies before making a decision on the applicants. According to the 1st and 2nd Interested Parties, a letter dated 5th July, 2019 was received from the **NIS** to the effect that it had received adverse reports against some of the Applicants but did not furnish the reports, nor were any particulars of the alleged adverse reports provided to the 1st Interested Party to enable the affected persons respond as required by **Article 47** of the **Constitution** and **section 4(3)(g)** of the **Fair Administrative Action Act**.

44. They submit that the **NIS** was given an opportunity to provide particulars of the adverse reports since the entire exercise of recruitment of Judges was time bound, but in its letter dated 21st July, 2019, the **NIS** declined stating that it had discharged its obligation in its first letter.

45. It also submits that the interviews were conducted publicly, broadcast on all television stations and streamlined online on digital platforms, to ensure the process was transparent. They urge that after a rigorous vetting process including comprehensive consideration of the Applicants' characters, integrity and professional qualifications, the 1st Interested Party discharged its constitutional mandate as required by the **Constitution** and the **Judicial Service Act** and recommended the successful persons for appointment as Judges.

46. They assert that by a letter dated 23rd July, 2019, the 1st Interested Party recommended to the President 11 persons for appointment as Judges of the Court of Appeal together with a detailed report on the recruitment and selection process. It also forwarded 20 names of persons recommended for appointment as Judges of the ELC together with a detailed report on the recruitment and selection process, and names of 10 persons recommended for appointment as Judges of the ELRC, together with a detailed report on the recruitment and selection process through letters dated 13th August, 2019 respectively.

47. They further submit that **section 30** of the **Judicial Service Act** provides the statutory framework for the transparent appointment of Judges; that the comprehensive recruitment and subsequent recommendation of persons for appointment, is set out in detail under **paragraphs 1 – 16** of the **First Schedule** to the **Act**.

48. The 1st and 2nd Interested Parties maintain that under **PART VI** of the **First Schedule** to the **Act** there is no provision for the President to reject or disapprove of any of the persons recommended for appointment. They argue that the appointment process referred to in the replying affidavit of Mr Joseph Kinyua is not envisioned under the **Constitution** or the **Act**; that under the Constitution, the duty of the President in the appointment of judges is ceremonial and is only intended to formalize the appointment of the persons recommended by the 1st Interested Party.

49. They rely on a publication titled ***"Kenya Democracy and Political Participation: a Review by AfriMap, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS),*** by Professor Karuti Kanyinga, for the submission that under the **2010 Constitution**, the 1st Interested Party exudes more credibility in its operations, particularly because of the concept of the nomination of judges before their formal appointment by the President, unlike under the former Constitution.

50. The 1st and 2nd Interested Parties rely on decisions in ***Justice Alliance of South Africa v President of Republic of South Africa and Others*** (consolidated with) ***Freedom Under Law v President of Republic of South Africa and Others and Centre for Applied Legal Studies and Another v President of Republic of South Africa and Others*** (CCT 53/11) and ***Karahunga v Attorney General*** [2014] UGCC 13.

51. They also rely on ***Law Society of Kenya v Attorney General & 2 others*** (supra), for the submission that the issue of the role of the President and the reasonable time for the appointment of judges recommended by the 1st Interested Party had been settled in that petition.

52. In their view, the duties and functions of the President spelt out under **Article 132** of the **Constitution** do not include the power to vet the suitability of persons recommended for appointment as judges by the 1st Interested Party. They assert that any rejection or disapproval by the President, of the persons recommended for appointment, subverts the constitutional independence of the judiciary. Further that failure to formalize the appointment of Judges goes against the solemn constitutional duty of the President under **Article 131(2)(c)** of the **Constitution** to ensure protection of human rights, fundamental freedoms and the rule of law.

53. They agree with the Petitioner's position that the President's inordinate delay to formalize the appointment of the Judges, undermines the constitutional role of the 1st Interested Party in safeguarding and promoting independence of the Judiciary. They urge the court to defer to the Constitution and intervene by making appropriate orders. They argue that although the doctrine of separation of powers is part of our Constitutional design, the court is empowered to intervene when there is an imminent threat to the Constitution.

54. The 1st and 2nd Interested Parties rely on the decision in ***Re the Matter of Speaker of the Senate & another,*** **Advisory opinion No 2 of 2013 [2013] eKLR,** paragraphs 57, 59 and 64 on separation of powers. They also rely on the decision of the Constitutional Court of South Africa in ***Hugh Glenister v President of the Republic of South Africa & 11 Others*** [2008] CCT 41/2008, to buttress this point.

The 3rd Interested Party's Case

55. The 3rd Interested Party supports the Petition through a replying affidavit by Ms Mercy K Wambua, its Chief Executive Officer, sworn on 6th December, 2019. Ms Wambua deposes that the 3rd Interested Party is mandated under **section 4** of the **Law Society of Kenya Act,** to, *inter alia,* assist the government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya, and that the substratum of this Petition, therefore, relates to members of the Law Society of Kenya.

56. Ms. Wambua echoes the depositions in Ms. Amadi's affidavit, and contends that the process leading to the recommendation involved a widely consultative approach that included consultations between the 1st and 3rd Interested Parties. She states that the President and members of public had adequate opportunity to express their reservations with regard to the applicants during the interview process; that in any case, the President has Commissioners in the 1st Interested Party, one of whom is the Respondent and, therefore, the President had adequate opportunity to express reservations with regards to any applicant during the recruitment process through his representatives.

57. The 3rd Interested Party contends that recommendations by the 1st Interested Party to the President with regards to appointment of Judges as contemplated under **Article 172(1)** of the **Constitution,** is an inextricable constitutional decision that the President must abide by. It further states that as head of state, the President's role in the appointment of Judges is ceremonial.

58. On the allegation that the President received adverse reports with regard to certain applicants, MS Wambua states that the **Constitution** has in-built mechanisms for the removal and or disciplining of errant judicial officers under **Article 168,** which mechanisms have not been triggered against any of the judges recommended for appointment to the Court of Appeal. It is also argued that there exist legal mechanisms to deal with any integrity breaches with regard to advocates and members of the 3rd Interested Party, which have not been engaged with regard to any advocates alleged to have chequered records and have been recommended for appointment as judges.

59. In its submissions, the 3rd Interested Party argues that the judicial appointment mechanism in the Constitution guarantees the main pillars of judicial independence, namely; functional and financial independence. To this end, it argues, the Constitution makes

the process of appointment of judges a collegiate affair involving the President, the 1st Interested Party and members of the public, and in the case of the Chief Justice and Deputy Chief Justice, Parliament.

60. Relying on the decision of the Constitutional Court of South Africa of ***New National Party v Government of the Republic of South Africa and Others (1999) ZACC 5; 1999(3) SA 191; 199(5) BCLR 489***, paragraphs 74 and 162, the 3rd Interested Party submits that functional independence means, that the 1st Interested Party must have administrative independence and freedom from interference from political institutions or individuals.

61. It is the 3rd Interested Party's further submission, that impugning the character of the persons recommended by the 1st Interested Party for appointment by the President amounts to interfering with a valid decision made by the 1st Interested Party. It argues that the 1st Interested Party's decision to vet, interview and select persons for appointment to the Court of Appeal, the ELC and the ELRC, was exercised in accordance with its functional independence, and cannot be impeached by the President in the manner he seeks to.

62. To this end, it relies on the decision in ***Law Society of Kenya v Attorney General & 2 others*** (supra) and ***Law Society of Botswana & Another v The President of Botswana & 2 others*****, Civil Appeal No. CACGB-031-16**.

63. The 3rd Interested Party argues that in assessing any interference with the independence of the 1st Interested Party, the court ought to employ the test adopted by the Constitutional Court of South Africa in ***Van Rooyen No v S and Others*** **2002 (8) BCLR 810 CC**, where while elaborating on the test for independence, the court stated that the determining factor is whether from the standpoint of a reasonable and informed person, there will be a perception that the institution enjoys the essential conditions of independence.

The Respondent's Case

64. The Respondent opposes the Petition through a replying affidavit by Mr Joseph K. Kinyua, Head of Public Service in the Office of the President, sworn on 18th October, 2019, and written submissions dated and filed on even date.

65. As a preliminary issue, the Respondent argues that this court ought to first address itself on whether it has jurisdiction to hear and determine the instant Petition. The Respondent submits that the concern on whether or not this court has jurisdiction to hear the Petition, stems from various decisions by this Court and others from the ELRC which have not been definitive in demarcating the jurisdiction of either courts in such matters.

66. Relying on the decision in ***Institute of Social Accountability & another v National Assembly & 4 others*****, High Court Petition No. 71 of 2014 [2015] eKLR**, the Respondent submits that in determining this Petition, the court must give a purposive interpretation to the various constitutional provisions which deal with the recommendation and appointment of Judges; the powers and functions of the President and the 1st Interested Party, and the applicable principles of the Constitution that inform the appointment process.

67. In his affidavit, Mr. Kinyua deposes that the President is the Head of State and Government as provided under **Article 131(1)** of the **Constitution,** and that as head of state, the President has exclusive authority to appoint judges in Kenya on behalf of the citizenry in accordance with recommendations from the 1st Interested Party.

68. He states that there is an express constitutional intent of not providing a timeframe within which the President is to appoint judges on recommendation of the 1st Interested Party. In his view, timelines cannot, therefore, be provided by any other person or organ. According to Mr Kinyua, where time is of the essence in carrying out any constitutional function, the Constitution expressly provides so.

69. It is the Respondent's case, that as Head of State and Government, and the Principal State officer, the President is sworn to ensure fidelity to the national values and principles of governance set out under **Article 10** of the Constitution. The Respondent contends that the President has not declined to perform his duties regarding appointment of persons recommended, as judges, but is merely taking steps to ensure he does so in accordance with the purposes and objects set out under the Constitution, and in a manner that brings honour to the nation, dignity to the office of the judges, and promotes public confidence in the integrity of the office, as

set out in the Constitution.

70. In the Respondent's view, the issue of delay in the appointments is a matter of fact as reasonable time is case specific and dependent on the peculiar facts and circumstances of the matter. To support this position, the Respondent cites the decision in ***Utalii Transport Company Limited & 3 others v NIC Bank Limited & another*** **[2014] eKLR,** where the court set out what inordinate delay means.

71. The Respondent argues that by dint of **Article 10** of the **Constitution**, no State or public officer can be contemplated to act in a ceremonial manner in the public sector. The Respondent submits that the Article enjoins consideration and observation of the national values and principles of governance in the exercise of every function, including appointments. It is further submitted that while undertaking the function of appointment of Judges, the President is sworn to take into account, *inter alia,* the principles of good governance, public participation, integrity, transparency, accountability and sustainable development.

72. According to the Respondent, the Court of Appeal, as presently constituted, has met the constitutional and statutory threshold in terms of numbers; that **section 4(1)(b)** of the **Court of Appeal (Organization and Administration) Act,** provides that the Court of Appeal shall consist of not less than twelve (12) judges appointed in accordance with **Articles 164(1)(a), 166(1)(b)** and **166(4)** of the **Constitution**.

73. It is the Respondent's further case, that whereas **section 4(3)** of the **Act** provides that the 1st Interested Party may, from time to time, conduct or cause to be conducted a judicial needs assessment and recommend the appropriate number of judges required for appointment to the Court, the 1st Interested Party is yet to furnish the President with a report of the judicial needs assessment which was the basis of recommendations for the appointments.

74. This argument is supported by Mr. Kinyua's deposition that the President is yet to be furnished with a report of the envisaged judicial needs assessments by the 1st Interested Party which formed the basis of the recommendation for the appointments. He argues that for purposes of financial allocation, it was necessary for the 1st Interested Party to provide the bio data of the persons recommended for appointment to enable relevant State organs to project the financial implications, including salaries and pensions.

75. He states that it is imperative that there is a provision not only of the Judges' salaries, but also pension, before appointment since the remuneration and benefits payable to judges cannot be varied to their disadvantage. This, he states, is especially so, during the current times when the government is rationalizing budgets for the nation's sustainability.

76. It is contended that the process of removal of judges once appointed into office is elaborate, laborious and expensive hence the need not to rush the process of appointment; that in appropriate cases and circumstances, the recommendations by the 1st Interested Party, may be subjected to review by either the courts or the 1st Interested Party and consequently, it would be remiss of the President to appoint the judges without considering the impact to the principles of good governance, integrity, accountability, public participation and sustainable development.

77. In the Respondent's view, the prospect that the President should first appoint and thereafter consider the constitutional principles and their impact, either by way of judicial review or otherwise, would be absurd, given the irreversibility of the decision to appoint.

78. According to Mr. Kinyua, the President had received adverse reports in respect of some of the persons recommended for appointment as Judges after their names were published in the media. He states that it would be irresponsible and contrary to his oath of Office, for the President to appoint Judges or any other public or State officer to office, where serious questions have been raised about their integrity. This, he argues, is more serious for Judges who enjoy security of tenure and whose probity and integrity should be above reproach.

79. It is the Respondent's case, that the President is actively consulting with relevant State organs with a view to taking appropriate legal and administrative action, including a review of the recommendations, actions that have since been suspended pending the hearing and determination of this petition.

80. According to the Respondent, independence of the Judiciary is not only guaranteed by the mode of appointment of Judges, but

also their terms of service, tenure in office, financial autonomy, mode of discipline and removal. To this end, the Respondent submits that it is important that the provisions regarding the independence of the judiciary are looked at in a wholesome way rather than in an itemized manner. The Respondent asserts that this was the position accepted by the Court in ***Law Society of Kenya v Attorney General & 2 others*** (supra).

81. Relying on the decision in ***Re the matter of Speaker of the Senate & another*** (supra) the Respondent argues that the system of checks and balances in the Constitution is geared towards preventing autocracy and to restrain institutional tyranny. The Respondent contends that an interpretation that makes recommendations by the 1st Interested Party not subject to any other state organ in the appointment of Judges would be contrary to the architecture of the Constitution.

82. The Respondent argues that to hold that the 1st Interested Party's role in the appointment of Judges is absolute, is to negate the fundamental principle of the Constitution. In his view, the Petition is unmeritorious and should be dismissed with costs.

Analysis and Determination

83. We have considered the petition, depositions and submissions for and against the petition. In our view, the following issues arise for determination, namely;

i. Whether the court has jurisdiction to hear and determine this petition

ii. whether the President has mandate to review, decline or refuse to appoint persons recommended by the 1st Interested Party as judges

iii. whether the delay or refusal by the President to appoint the persons recommended by the 1st interested party as judges, is unconstitutional

iv. What reliefs to grant, If any

Whether the court has jurisdiction

84. The Respondent has argued through his submissions that this court has no jurisdiction to determine this petition. His concern on whether or not this court has jurisdiction to hear this Petition, stems from various decisions by this Court and those by the ELRC which have not been definitive in demarcating the jurisdiction of either court in matters such as the one before this court.

85. The Petitioner and the Interested Parties contend that this is the only court that has jurisdiction to determine this Petition. They have relied on **Article 165(3) (d)** of the **Constitution** to buttress their argument that this court has constitutional mandate to determine among others, any question respecting the interpretation of the constitution; whether any law is inconsistent with, or is in contravention of the Constitution, and the question whether anything said to be done under the authority of the Constitution or of any law, is inconsistent with, or in contravention of, the Constitution.

86. Jurisdiction is that power or authority conferred on a Court to determine disputes presented before it for resolution. That power may be conferred by the Constitution, statute or both. It may be limited in like manner. See ***Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited*** **[1989] KLR 1.**

87. In ***Re The Matter of Interim Independent Electoral Commission***, **[2011] eKLR**, the Supreme Court stated with regard to the source of jurisdiction;

"Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent… Jurisdiction flows from the law, and the recipient Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours..."

88. And in ***Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others*** **[2012]eKLR,** the same Court again stated:

"A Court's jurisdiction flows from either the Constitution, or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…where the constitution exhaustively provides for the jurisdiction of a Court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation..."

89. The jurisdiction of this court is derived from the Constitution and **Article 165(3)** is clear on this. **Sub Article (3) (d)** states that this court has jurisdiction to hear any question respecting the interpretation of this Constitution, including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution.

90. It is therefore clear from the constitutional text that one of the core mandates of this court is not only to interpret the Constitution but also to determine whether actions purportedly done under the authority of the Constitution are in accord with it.

91. The issues that arise for determination in this petition, are whether, the 1st Interested Party acted in accordance with the Constitution and the law in the recruitment process and whether the President's actions of refusal or delay to appoint persons recommended by the 1st Interested Party, are in consonance with the Constitution. That, in our view, falls squarely within the mandate of this court and no other. This is the court that is clothed with jurisdiction to safeguard, protect and defend the Constitution. This court cannot, therefore, abdicate this mandate as the Respondent suggests.

92. Second, we do not find anything to suggest that the issues raised in the Petition are for determination by the ELRC as the Respondent contends. **Article 162(2)** directed Parliament to establish courts of the status of this court to deal with issues of (a), the environment and the use and occupation of, and title to, land and (b), employment and labour relations. Parliament was also to determine the jurisdiction of those courts. That is different from the jurisdiction of this court to interpret the Constitution and issues of compliance with it, which is conferred by the Constitution and not statute. What is before this court is a constitutional issue under **Article 165(3) (d)** and nothing else.

93. Third, we are unable to trace any question of employee-employer relationship in this petition that would make this matter fall within the exclusion clause in **Article 165(5)** which bars this court from hearing matters reserved for the exclusive jurisdiction of the courts contemplated under **Article 162 (2) (a)** and **(b)**, that is; the ELC and ELRC. We therefore find no merit in the preliminary objection and consequently, dismiss it.

Whether the President has mandate to review, decline or refuse to appoint persons recommended by the 1st Interested Party, as judges

94. The Petitioner, 1st, 2nd and 3rd Interested Parties have argued that the President has no mandate to decline to appoint persons recommended or subject the list to a review. In their view, the President's action violates the principles of the Constitution and independence of the 1st interested party and that of the Judiciary.

95. The Respondent on his part maintains that the President has power to decline to appoint the persons recommended by the 1st Interested Party. In the view of the Respondent, the President's mandate is not merely ceremonial, but he has to ensure that the Constitution is complied with; that persons so recommended are of high integrity and that the President may decline if he has reason to do so.

96. The Respondent further contends that the President has not received reports on the needs assessment that informed the recruitment and attendant recommendations for appointment to the various Courts. We understand the Respondent to argue that the President and the Treasury should have been consulted before the recruitment process commenced.

97. To resolve the contestation, we must begin with the Constitution itself. **Article 171** establishes the 1st Interested Party as an independent constitutional Commission whose mandate is clearly spelt out in **Article 172(1)** of the **Constitution** which provides:

"The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall —

(a) recommend to the President persons for appointment as judges;

(b) review and make recommendations on the conditions of service of —

(i) judges and judicial officers, other than their remuneration; and

(ii) the staff of the Judiciary;

(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;

(d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and

(e) advise the national government on improving the efficiency of the administration of justice

98. **Sub Article 2** states that in the performance of its functions, the 1st Interested Party shall be guided by competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary and the promotion of gender equality.

99. In that regard, it is the 1st Interested Party's mandate to carry out interviews and recommend persons for appointment as Judges of Superior Courts. The process of recruitment of judges is provided for both under the **Constitution** and the **Judicial service Act**. The process is elaborate and in this petition, there is no suggestion by the Respondent that the Constitution and statutory process were not followed in arriving at the names of the persons recommended.

100. The affidavit of Ms Amadi has placed before the court the elaborate steps that both the 1st and 2nd Interested Parties took to have the input of the then President of the Court of Appeal, now the Respondent, who had recommended that no less than 6 Judges of appeal be appointed. That was on 23rd May 2017. Subsequently, the current President of the Court of Appeal is of the same view that the Court needs more human resource in form of recruitment of more Judges to bolster the numbers in that court for optimal performance.

101. Further, the Presiding Judge of the ELC and the Principal Judge of the ELRC also gave their input and were clear that the numbers they had in their courts were inadequate. Following those consultations, the 2nd Interested Party determined that there was need to recruit 11 Judges to Court of Appeal, 20 to the ELC and 10 to the ELRC and declared vacancies to this effect.

102. The 1st Interested Party then advertised the vacancies, called for applications from interested persons, conducted interviews and recommended to the President, persons for appointment as judges of the respective superior Courts. Prior to conducting interviews, the 1st Interested Party called for information from members of the public, institutions and agencies which it considered before making the recommendations.

103. It is on record from both the 1st Interested Party and the Respondent, that the **NIS** wrote to the 1st Interested party informing it that there were adverse reports on a number of the applicants. The 1st Interested Party requested for particulars of the adverse reports in its possession but the **NIS** declined to disclose the adverse reports arguing that it had discharged its obligation in its first letter.

104. This, in our view, seems to be the main reason why the President has declined or delayed to make the appointments. This is also clearly discernible from the affidavit of Mr Joseph Kinyua. The argument the Respondent raises through that affidavit, is that due to the adverse integrity reports against some of the persons recommended for appointment, the President cannot formalize the appointments. There is a deposition to the effect that the President is even contemplating legal and administrative actions which he has however withheld pending the determination of this petition.

105. In 2010, the people of Kenya gave to themselves a transformative Constitution that ushered in a different constitutional architecture with independent commissions and offices that exercise mandate on their behalf. One of these independent commissions is the 1st interested party. It was bestowed with the mandate of ensuring the independence of the Judiciary through recruitment, discipline of judicial officers and staff and initiating the removal process of Judges.

106. The 1st Interested Party was, therefore, given constitutional operational and financial independence to enable it discharge its mandate without direction or control from any person or authority. This means that in the exercise of its operational independence conferred by the Constitution and the law, the 1st Interested Party is not subject to interference from any person or authority.

107. With regard to the appointment of judges, **Article 172(1)(a)** confers on the 1st Interested Party the mandate to recommend to the President persons for appointment as judges. **Article 166(1)** provides for the appointment of the Chief Justice, Deputy Chief Justice and all other judges of superior courts as follows:

"(1) The President shall appoint—

(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and

(b) all other judges, in accordance with the recommendation of the Judicial Service Commission."(Emphasis)

108. The Article is clear that appointments are to be as recommended by the 1st Interested Party. The 1st Interested Party is an independent organ that enjoys independence when it comes to recruitment of judges of superior courts. This mandate is protected by the Constitution and the 1st Interested Party does not have to seek anyone's permission when discharging this mandate. Its fidelity is only to the Constitution and the law. This is clear from the Constitutional text.

109. **Article 249(1)** provides for the objects of commissions and independent offices, thus:

"The objects of the commissions and the independent offices are to—

(a) protect the sovereignty of the people;

(b) secure the observance by all State organs of democratic values and principles; and

(c) promote constitutionalism."

110. The Article is clear that the objects of the commissions, including the 1st Interested Party are to protect the sovereignty of the people, including their sovereign will; secure observance by State organs, including the Presidency, of democratic values and principles in the Constitution and, most importantly, promote ***constitutionalism***.

111. **Sub Article (2)** is emphatic that:

"The commissions and the holders of independent offices—

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to direction or control by any person or authority."

112. The 1st Interested Party is independent in the discharge of the functions allocated to it by the Constitution and the law. It is not subject to any person or authority. That explains why ours is a transformative Constitution that allocates functions and mandate, roots for its observance and infuses constitutionalism in it.

113. Eric Kibet and Professor Charles Fombad, in their scholarly article; ***Transformative constitutionalism and the adjudication of constitutional rights in Africa***; African Human Rights Journal Vol. 17 No. 2. Pretoria, 2017 opine that:

"The quest to strike a balance between anarchy, on the one hand, and tyranny, on the other, is a key preoccupation of constitutional law and the core of constitutionalism. The primary function of constitutions is to strike this balance by establishing power maps for the exercise of public power in a fashion that ensures that the government is neither too weak nor despotic. Thus, constitutions create state institutions, allocate to them powers and, importantly, define the limits of their powers. In this sense, constitutionalism is the notion of government limited by law. It posits that it is possible and, indeed, desirable, that government should be limited by law, the constitution sitting at the top in the hierarchy of law."

114. The Constitution has drawn a power map between the 1st Interested Party's mandate to carry out interviews and recommend persons for appointment and the President's duty to appoint the persons so recommended as judges of the superior courts. The Constitution does not allocate the President any power or mandate to comment on or review the decisions made by the 1st Interested Party. The Constitution does not even give him power to decline to appoint the persons recommended to the position of judge of superior courts.

115. To that extent, therefore, the 1st Interested Party has the sole mandate to call for applications, conduct interviews and recommend suitable persons for appointment as Judges in accordance with **Article 166(1)(b)** as read with **Article 172(1)(a)**. The 1st Interested party's mandate in the recruitment of Judges of superior courts is not subject to direction or control of any person or authority. This independence is guaranteed in clear and plain language in **Article 249(2)**.

116. In the discharge of its mandate, the 1st Interested Party is subject only to the Constitution and the law. **Article 10 (2)** requires transparency, accountability and public participation in the discharge of the recruitment mandate. It was in appreciation of these founding values, that the 1st Interested Party advertised the vacancies, invited applications from qualified persons, called for information from members of the public, institutions and agencies, conducted interviews and made public the names of those it had recommended for appointment as Judges of the various superior courts before forwarding those names to the President for formal appointment.

117. The fact that the 1st Interested Party conducted the process in an open and transparent manner and complied with the requirement of merit has not been impugned by the Respondent at all. There is not even a suggestion that those recommended for appointment, do not meet the merit criteria. The argument is that there is some doubt on the integrity of some of the persons recommended for appointment.

118. As we have already explained, the public and institutions were given an opportunity to volunteer information that would assist the 1st Interested Party make a decision on the appointments. The **NIS** wrote a letter hinting that there were adverse reports about some applicants but did not give details even after it was afforded an opportunity to do so. The 1st Interested Party made a decision based on the information available before it.

119. The 1st Interested Party could not act on the letter by the **NIS** as this would have violated the Constitution and the law**.** We say this because we operate in a constitutional democracy. **Article 19** is clear that rights belong to individuals and are not granted by the State and must be respected by all State organs. **Article 47(1)** confers on every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The information the **NIS** said it had, and the manner of dealing with it, was an administrative action. That is, the persons adversely mentioned, if at all, were entitled to an action that was lawful and procedurally fair.

120. Secondly, they had the right to seek to be appointed judges of superior courts and any adverse information the **NIS** may have had, would have affected this right and for that reason, **Article 47(2)** is clear that where a right or fundamental freedom of a person is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

121. The information the **NIS** allegedly had, was likely to affect the rights of the persons the letter adverted to. For that reason, the 1st Interested Party was under a constitutional obligation to inform the affected persons the nature of the adverse information against them to enable them respond to the allegations before it made a decision. Without the **NIS** disclosing the adverse information, even after being asked to do so, the 1st Interested Party could not use information it did not have against the applicants in violation of their constitutional rights and fundamental freedoms.

122. Our Constitution is not a docile document. **Article 2(1)** declares it the supreme law of the Republic that binds all persons and State organs at both levels of government. **Article 3(1)** obligates every person to respect, uphold and defend the Constitution. Further, the founding principles in **Article 10(2)** bind all State organs, State officers, public officers and all persons whenever they interpret the Constitution, enact or interpret a law or formulate public policy.

123. The **NIS** as an organ established under the Constitution, is required to act in a manner consistent with the Constitution. Section 3(1) of the **National Intelligence Service Act,** 2012, provides that:

"The Service shall, in fulfilling its mandate, observe and uphold the Bill of Rights, values and principles of governance under Article 10(2), the values and principles of public service under Article 232(1) and the principles of national security in Article 238(2) of the Constitution…"

124. The **NIS** is also required by **section 3(1)(c)** of the Act, to comply with the constitutional standards of human rights and fundamental freedoms. **Article 47** falls within the Bill of Rights that the **NIS** is required to comply with. The principles in **Article 10(2)** include transparency, accountability and good governance that bind the **NIS**.

125. In that regard, we have no doubt that the founding values in our constitutional architecture leave no room for mob lynching. We say so since transparency and accountability means that every State organ, State officer, public officer, institution or agency, must account for its actions, including those who hold the view that some of the persons recommended for appointment as judges have integrity issues. The persons adverted to in the said letter, were entitled to know what the allegations against them were and to respond to them. Opaque statements or allegations of lack of integrity, without disclosure of what the specific issues were, runs counter to the spirit of the Constitution and its expansive Bill of Rights.

126. The **NIS,** having voluntarily alluded to the existence of some adverse information about some of the applicants, yet declined to disclose the particulars when called upon to do so by the 1st interested party, it acted contrary to the dictates of the Constitution and its own statute which require it to act in accordance with the Constitution and observe the highest standards of human rights and fundamental freedoms.

12. Mr Bitta, counsel for the Respondent, attempted to justify the decision by the **NIS** declining to disclose the information on grounds that its statute prohibits it from disclosing "**classified**" information. Section 63(1) of the Act provides that;

"A person who is or was a member of the Service shall not without the authority of the Director-General disclose or communicate, whether in Kenya or elsewhere, classified information or any information the disclosure of which is detrimental to national security."

128. **Section 2** of the Act defines ***"classified information"*** as ***"information of a particular security classification, whose unauthorized disclosure would prejudice national security."*** We are in great difficulty to understand how allegations of lack of integrity on the part of some of the applicants, can be ***"classified"*** information that would prejudice or compromise national security if disclosed to an independent State organ to enable it discharge its constitutional mandate. Suppression of such information, if true, would only incapacitate the State organ in the discharge of its mandate and threaten compliance with the Constitution.

129. The President seeks to rely on reports that are undisclosed and, therefore, unknown to the 1st Interested Party and those said to be adversely mentioned. This cannot justify the President's refusal to appoint the persons recommended as judges. The refusal to appoint, in our respectful view, not only threatens, but also interferes with the operational independence of the 1st Interested Party.

130. The issue of the independence of Commissions and Independent Offices is critical in the performance of functions and discharge of mandate of these organs and is not to be interfered with at any cost. The Supreme Court stressed on the purpose of the independence clause in ***Re the matter of the Interim Independent Electoral Commission; Supreme. Court Advisory Opinion No. 2 of 2011;*** **[2011] eKLR,** thus:

"[59] It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government...

[60]The several independent Commissions and offices are intended to serve as "people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the 'independence clause".

131. The court observed, however, that for due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance, and that, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest.

132. Further, in ***Communications Commission of Kenya & 5 others v Royal Media Services & 5 others [2014] eKLR)***, the Supreme Court emphasised about the independence, stating:

[169] Therefore, "independence" is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance."

133. The Court went on to state regarding the attainment of that independence:

"[170] How is the shield of independence to be attained" In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain "independence" in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these "other safeguards" can singly guarantee "independence". It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence."

134. In that regard, the 1st Interested Party's independence is not a matter of conjecture or speculation. It is a constitutional imperative that cannot be interfered with by any person, organ or authority. It is constitutionally guaranteed and protected. The fundamental question, therefore, is whether having made recommendations of persons to be appointed as Judges, the President can decline or refuse to appoint them.

135. According to the affidavit by Mr Joseph Kinyua and submissions made on behalf of the Respondent, the President has mandate to decline to make appointments as recommended by the 1st Interested Party. Their argument is that the President, as head of state and government, is mandated to ensure that the Constitution is complied with. In their view, the President received adverse reports about some of the applicants and it was his obligation to withhold his authority of appointing the persons recommended by the 1st Interested Party as judges of the various superior courts.

136. We are unable to agree with the Respondent that the President has constitutional or legal mandate to act contrary to the 1st Interested Party's decision recommending persons for appointment as judges made in accordance with the Constitution and the law. It has not been demonstrated to this court, that there is any provision in the Constitution or statute that confers such power on the President.

137. Adverse reports, if any, against some, or any of the persons recommended for appointment, should have been placed before the 1st Interested Party, the only State organ that is constitutionally mandated to determine suitability of persons to recommend for appointment as judges. Once the **NIS** declined to give the information, the 1st Interested Party had no basis whatsoever to make adverse findings against any of the persons said to be adversely mentioned. In the circumstances the 1st Interested Party properly discharged its mandate as required by the **Constitution** and the **Judicial Service Act**.

138. We state without hesitation, that integrity is one of the founding values in our Constitution. In our view, lack of integrity cannot be "classified information", and there was no justification for not disclosing such information to the 1st Interested Party. As we have already stated, classified information must have something to do with national security and that certainly, cannot include an allegation that one has no integrity.

139. This Court has held before, and we respectfully agree, that the 1st Interested Party's decision recommending persons for appointment by the President as judges, is not subject to review, reconsideration or second guessing by the President. In ***Law Society of Kenya v Attorney General & 2 others*** (supra), a petition that dealt with the same issue as the one before this court, and after observing that the President is represented in 1st Interested Party by the Attorney General and three other members appointed by him; the court stated:

"[71]It is our view that the President having taken part in the nomination process through his said appointees, once the Commission nominates the persons to be appointed as Judges, the President's role is then limited to appointment, swearing in and gazettement of the said persons as Judges of the High Court. He cannot therefore purport to "process", "vet", "approve" or "disapprove" the said nominees. At that stage the issue of consultation with the Chief Justice, also a member of the Judicial Service Commission, does not arise."

140. The court then went on to hold:

"[72]In our view, once the nomination process is finalised, subject to paragraph 16 of the First Schedule to the Act, the Commission and the President have no other role to play in the matter apart from putting in place the formalities of appointing the nominees as Judges of the High Court. In our view, the only way in which the names presented to the President can be reconsidered, and if so by the Commission itself is pursuant to paragraph 16 of the First Schedule to the Judicial Service Act, 2011"

141. We entirely agree with the above proposition of the law, that once the 1st Interested Party makes recommendations, the President has no other option but to formalize the appointments. He cannot change the list, review it or reject some names. He cannot even decide who to appoint and who not to appoint. He must appoint the persons as recommended and forwarded to him by the 1st Interested Party. **Paragraph 16** of the **First Schedule** to the **Judicial Service Act** is clear that even the 1st Interested Party ***"shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity, or withdrawal of a nominee."***

142. That means once the recommendations were made and forwarded to the President, the 1st Interested Party became ***functus officio*** and the President was bound by the Constitution and the law to appoint the persons recommended as Judges. The President is responsible for the formal act of appointing the judges in our jurisdiction. Our Legal framework clearly sets out the relationship between the prior selection process conducted by the 1st Interested Party and the role of the President at this final stage.

143. **Article 172(1)(a)**, is that one of the core mandates of the 1st Interested Party is to recommend to the President persons for appointment as judges. Thereafter, **Article 166(1)(b)** provides in mandatory terms that, ***"the President shall appoint all other judges, in accordance with the recommendation of the Judicial Service Commission."*** Our understanding of the Constitution and the law is that the 1st Interested Party is required to present the President with a single, binding recommendation for each vacancy. We therefore find and hold, that the President has no residual legal power to question or reject names recommended to him by the 1st Interested Party for appointment as judges in accordance with the Constitution.

144. We agree with the court in the above decision that the constitutional scheme in coming up with this new way of appointing judges was intended to avoid sliding back to the old system where appointment of Judges could not be traced to any particular criteria. To accede to the position taken by the Respondent in this petition, that the President has any powers in determining who to appoint, would amount to allowing a proposition to take the people of Kenya back to an era they overwhelmingly discarded when they enacted and adopted the current Constitution. This would certainly amount to this court acting contrary to the Constitution.

Whether the delay or refusal to appoint the persons recommended is unconstitutional

145. The Petitioner and the Interested Parties argue that the delay in making the appointments is inordinate and, therefore, unconstitutional. The Respondent, on his part, argues that there is no time limit set by the Constitution to making the appointments. In the Respondent's view, unlike in the case of appointment of judges, where the Constitution contemplates that actions be taken within a given timeline, it has stated so. He contends that there is no delay in the appointments herein and, therefore, there is nothing unconstitutional.

146. Well, the Respondent's argument may appear attractive but it misses the point. Recommendations were made on 23rd July2019 and 13th August 2019 respectively, but the President had not appointed the persons recommended by the time of filing and hearing of this petition. Whereas it is true that the Constitution does not set the time within which the President should formalise the appointments, our reading of the mandate of the 1st Interested Party and that of the President, is that the appointment must be immediate because the President plays no other role in the process, except to formally appoint the persons recommended by the 1st Interested Party as required by **Article 166(1)(b)** of the **Constitution**

147. The people of Kenya did not expect the President to delay appointment of judges given that the persons so recommended are intended to serve the citizenry immediately in dispensing justice. The people may not have assigned time lines within which to formalise the appointment of judges because they did not expect the President to delay such appointments once he receives recommendation from the 1st Interested Party. The fact that there is no time limit, however, cannot be used to delay appointments done in accordance with the Constitution and the law.

148. Even if the Respondent was to successfully argue that there is no timeline and, therefore, the President can take as much time as he likes without violating the Constitution, then he needs to be reminded of **Article 259(8)** which provides that:

"If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises."(Emphasis)

149. In our view, the appointment of judges by the President, should be immediate and as soon as the recommendations are forwarded to him by the 1st Interested Party. That is the spirit of **Article 259(8)** of the **Constitution,** which demands that actions be taken without ***unreasonable delay,*** and as ***often*** as the occasion arises. The President is only required to put in place plans to appoint the persons recommended as judges. Such plans cannot take much time and, therefore, in our considered view, the reasonable time contemplated by the Constitution, should be within 14 days from the date recommendations are received to the President.

150. **Article 259** demands that the Constitution be interpreted in a manner that accords with its values and principles and, therefore, all actions by State organs, State officers and public officers must be done in accordance with the Constitution. **Article 259(3)** commands that every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.

151. In that regard, when the Constitution uses the words ***'reasonable time'*** and ***"as often as occasion arises"***, any action delayed beyond 14 days cannot be deemed to be within reasonable time.

152. This view was shared by this court in ***Law Society of Kenya v Attorney General & 2 others*** (supra) where the court stated:

"[94] In determining what is reasonable time therefore, it is our view that the timelines stipulated in the Constitution ought to act as a guide. Under Article 263 of the Constitution, the Constitution was to be promulgated within fourteen days of its gazettement. Under Article 115(1) the President is required to assent to a Bill within fourteen days after receipt thereof. Under Article 114(1) the President is required, within fourteen days after a vacancy in the office of Deputy President arises, to nominate a person to fill the vacancy. Under Article 158(4) of the Constitution, on receipt and examination of the petition for removal of the Director of Public Prosecutions, the President is required to, within fourteen days, suspend the Director of Public Prosecutions from office and, acting in accordance with the advice of the Public Service Commission, appoint a tribunal. Similarly, under Article 168(5), the President is required, within fourteen days after receiving the petition for removal of a Judge, to suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission, appoint a Tribunal."

153. The Court went on to state:

"[95] In our view the spirit of the Constitution is that when it comes to matters of national interest, the thread that runs across the constitutional timelines with respect to purely procedural matters where what is required is more or less a seal of approval or formalisation of a decision already substantially made, is that fourteen days period is generally reasonable."

154. The court then concluded thus:

[96] "Taking the cue from the said provisions it is our view that to subject persons who have been nominated for appointment as Judges for a waiting period of more that(sic) five months as was the case herein, is clearly unreasonable. It subjects the said nominees to unnecessary anxiety. In arriving at this decision, we take into account the strict timelines given to the Commission in undertaking the process of nomination of Judges. Such strict timelines show the seriousness with which the appointment of Judges ought to be treated. Accordingly, all the players in the chain of the appointment process ought to expedite the process of appointment of Judges taking into account the important role played by the Judiciary in the administration of justice in any democratic system of governance."

154. In the premise, we find and hold that the delay in appointing the persons recommended by the 1st Interested Party, is unreasonable and, therefore, unconstitutional.

155. In coming to this conclusions, we are guided by the Supreme Court observation in ***Communication Commission of Kenya & 5 others v Royal Media Services & 5 others*** (supra) that" ***the Constitution should be interpreted in a holistic manner, within its context, and in its spirit***. Further in ***Speaker of the Senate & Another v. Attorney-General & 4 Others*** (supra) the same court was clear that:

"**[156]**...***Each matter that comes before the Court must be seized upon as an opportunity to provide high-yielding interpretative guidance on the Constitution; and this must be done in a manner that advances its purposes, gives effect to its intents, and illuminates its contents"***

Reliefs to grant

156. The Petitioner, supported by the Interested Parties, urge this court to issue; a declaration to the effect that the President's failure to appoint the persons recommended by the 1st Interested Party as Judges, violates the Constitution; a declaration that the persons recommended be deemed duly appointed and should assume duties as judges of the respective superior courts, and a declaration that the Respondent and the Interested Parties should take immediate steps to enable the persons recommended for appointment as Judges discharge their constitutional mandate. The Petitioners urge this court to follow the decision in ***Law Society of Kenya v Attorney General & others [2019] eKLR*** which was on the appointment of members of the 1st Interested Party.

157. We must point out that the requirements for appointment under **Article 171,** are different from those in **Article 166(1)** as read with **Article 172(1)(a)**, which obligate the President as a matter of constitutional compulsion, to appoint the persons recommended to the office of judge. In that regard, the President is bound by the recommendation of the 1st Interested Party.

158. We have carefully considered the petition, the responses thereto; the submissions by all parties and the authorities relied on. We have also considered the Constitution and the law. We find that the President has no mandate to review, reconsider or decline to appoint persons recommended by the 1st Interested Party as judges. We also find that the delay by the President in appointing the persons recommended, is unreasonable and unconstitutional.

159. Taking into account the circumstances of this case, we are satisfied that the Petition is meritorious and succeeds. We therefore allow it and make the following orders, which we consider appropriate;

a) A declaration be and is hereby issued that the President is constitutionally bound by the recommendation made by the 1st Interested Party in accordance with Article 166(1) as read with Article 172(1)(a) of the Constitution on the persons to be appointed as Judges.

b) A declaration be and is hereby issued that the President's failure to appoint the persons recommended for appointment as Judges violates the Constitution and the Judicial Service Act.

c) A declaration be and is hereby issued that the continued delay to appoint the persons recommended as judges of the respective courts is a violation of Articles 2(1), 3(1), 10, 73(1)(a), 131(2)(a), 166(1), 172(1)(a) and 249(2) of the Constitution

d) Costs to the Petitioner.

Dated, Signed, and Delivered at Nairobi, this 6th Day of February, 2020.

.....

L. A. ACHODE

PRINCIPAL JUDGE.

.....

J. A. MAKAU

JUDGE

.....

E. C. MWITA

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 369 OF 2019

ADRIAN KAMOTHO NJENGA.....PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

AND

JUDICIAL SERVICE COMMISSION.....1ST INTERESTED PARTY

THE HON. CHIEF JUSTICE AND

PRESIDENT OF THE SUPREME COURT.....2ND INTERESTED PARTY

LAW SOCIETY OF KENYA.....3RD INTERESTED PARTY

RULING

1. On 6th February 2020, this court handed down its decision in a petition brought by Adrian Kamotho Njenga, who was the petitioner, against the Attorney general, the respondent, and the three interested parties. The court made several declarations in that judgment.

2. Thereafter, on 24th February 2020, the applicant took out a motion on notice, dated and filed on the same day, seeking a number of orders, as follows;

a) That a finding be made that by failing to appoint persons recommended for appointment as judge of the court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively within 14 days, the respondent is in breach of the orders of this Honourable court issued on 6th February 2020.

b) That a finding be made that the appointment of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of Employment and Labour Relations Court on 13th August 2019 respectively, having fallen due upon lapse of the 14 days' appointment window, and the appointing authority having failed

to act as per the constitution, the appointments have legally ripened and constitutionally crystalized.

c) That the respondent be directed to within 3 days publish for general information of the public in the Kenya Gazette, the names of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively.

d) That in the event of failure by the respondent to within 3 days publish in the Kenya Gazette the names of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively, the names of the said persons be immediately published by the 1st Interested Party, within 3 days in any newspaper of nationwide circulation.

e) That upon publication of the names of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and labour Relations Court on 13th August 2019 respectively, the 2nd respondent do within 3 days administer the oath or affirmation of office, in the manner and form prescribed by the Third Schedule to the Constitution to the said persons.

f) That the Chief Registrar of the Judiciary be directed to execute any document or legal instrument necessary for the full and proper assumption of office by the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively.

g) That he Controller of Budget be authorized to approve withdrawal of funds from the Consolidated Fund as per the prescribed legal terms, to facilitate the full and proper assumption of office by persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively.

h) That the Inspector General of National Police Service be directed to provide the requisite security arrangements as per policy, for the full and proper assumption of office by persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations court on 13th August 2019 respectively.

3. The motion was premised on the grounds appearing on its face and on the applicant's affidavit also sworn on the same day, 24th April, 2020. According to the applicant, the court, in its judgment of 6th February, 2020, pronounced that appointment of persons recommended by the Judicial Service Commission **(JSC)**, the 1st Interested party, as judges of superior courts, is immediate and, in any case, within 14 days from the date of such recommendation; that the President is constitutionally bound by the recommendations of the **JSC**; that failure to appoint the persons recommended for appointment violates the Constitution and that continued delay to finalize the appoint violates the constitution and the law.

4. The applicant's case is that even though the judgment and decree of the court has not been stayed, varied or set aside, the respondent has failed or refused to gazette the Judges recommended for appointment; that the respondent is in persistent contempt of the constitution and that he is willfully disobeying court orders.

5. In the supporting affidavit, the applicant has basically deponed that the appointment of the Judges should be immediate and not later than 14 days of the recommendations; that the appointment should have actualized by 20th February, 2020; that the respondent has refused to appoint the Judges in utter disregard of the Constitution and the law, and that he has failed or refused to abide by the judgment of the court.

6. The applicant further stated that although the respondent lodged a Notice of Appeal against the decision of the court, such a notice does not operate as stay of execution of that judgment. He urged that unless the orders sought are granted, impunity will be propagated.

7. The respondent filed a notice of preliminary objection to the motion on 10th March, 2020. He contended that the court has no jurisdiction to hear and determine the application, on the basis that it is functus officio. He did not, however, file a replying affidavit

to the motion.

8. The respondent filed written submissions dated 11th March, 2020 and filed on 12th March, 2020, in support of the preliminary objection.

9. On the issue functus officio, the respondent submitted that the court having rendered its final judgment on the claims and prayers in the petition, the applicant cannot re-open that petition given that one of the orders sought in the motion, was sought in the petition and was declined.

10. The respondent argued, therefore, that upon issuing its final judgment, the court became functus officio and it ought not revisit its decision and grant orders that had been declined. He relied on the decision in ***Re The estate of Kinuthia Mahuha (deceased)*** [2018] eKLR which cited **Telkom Kenya Ltd v John Ochanda (Suing in his own behalf and on behalf of 196 former employees of Telkom Kenya Ltd [2014] eKLR,** for the submission that functus officio is an enduring principle of law that prevents the reopening of a matter before a court that has rendered a final decision on the matter. It is the respondent's submission that based on the above principle; this court is precluded from granting the orders sought in the application.

11. The respondent further argued that the nature of declaratory orders is that they have no coercive effect and cannot be enforced against the respondent in the manner proposed in the motion. He relied on ***Johana Nyakisoyo Buti v Walter Rasugu Omariba & others*** (CA No. 182 of 2016), for the submissions that a declaration or declaratory judgment merely declares what the legal rights of the parties to the proceedings are; has no coercive power and does not require one to do anything.

12. The respondent also relied on ***Republic v Cabinet Secretary for Internal Security – Experte Gregory Oriaro Nyauchi & 4 Others*** [2017] eKLR, for the submission that a declaration is a formal statement by the court, pronouncing upon the existence or non-existence of a legal or constitutional state of affairs; declares what the legal position is and what the rights of the parties are, but does not contain an order which can be enforced against a respondent. It is not a coercive remedy.

13. According to the respondent, one of the orders sough in the motion cannot be granted since the court did not grant it in the petition. He relied on ***Coastal Bottlers Ltd v Chrispinus Omondi*** [2020] eKLR, for the submission that a prayer made and not specifically granted is deemed dismissed; ***Gilbert Mokaya Ombuki v Kenya Ports Authority*** [2020] eKLR, for the submissions that as the relief was not granted, the applicant was by his application, seeking to gain more than had been granted in the judgment, and ***Ken Freight (EA) Ltd v Benson K. Nguti*** [2015] eKLR, for the argument that what the applicant sought in that case were prayers that had not been granted by the court in its judgment.

14. Regarding the applicant's position that he, (respondent), had not sought stay of execution of the judgment, he contended that such an argument was not tenable. He relied on the Supreme Court of Nigeria's decision of ***Chief R.A Okoya v S. Santill & Others*** [1990] All NLR 250. 3, and Jamaican Supreme Court decision in ***Norman Washington Manley Bowen & Shahine Robinson & another*** [2015] JMCA Civ. 57, for the submission that a defendant who has filed an appeal against a declaratory judgment or order is not entitled to apply for a stay of execution of that judgment or order because a declaratory judgment or order has no coercive effect and threatens no one.

15. The respondent went on to argue that even though no stay had been sought, that did not entitle the applicant to institute and prosecute the present application. He urged the court to dismiss the motion.

16. The applicant filed written submissions dated 6th May 2020, in opposition to the preliminary objection and in support to the motion. He submitted that the respondent's preliminary objection is defective because it predates the motion; that the preliminary objection assaults the motion on technicalities and that it is craftily couched as an issue of jurisdiction. He also argued that Article 159(2) (d) of the constitution cannot resuscitate the preliminary objection. Article 159(2) (d) provides that one of the principles to guide courts and tribunals when exercising judicial authority is that justice should be administered without undue regard to procedural technicalities.

17. Regarding the respondent's submissions, the applicant argued that the respondent did not respond to the specific issues raised in the motion. He contended that the application seeks to enforce the judgment and decree of the court but does not seek to reopen the concluded petition. In the applicant's view, the fact that the court did not reproduce the prayers as sought in the petition when

issuing its judgment, did not mean the reliefs were declined. He contended that by terming the court functus officio, the respondent was trying to dissuade the court from using its judicial forum for enforcement of the judgment.

18. Regarding the principle of functus officio, the applicant argued that the issue was addressed by the Supreme Court in ***Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others*** [2013] eKLR (Par. 20, 21) to the effect that the court reserves jurisdiction to enforce its judgments.

19. The applicant further argued that the respondent cited decisions that were not compatible with the present application. In his view, the respondent's argument that the declarations that were granted had no coercive effect suggests that the judgment of the court is without significant consequence or effect. He contended that the petition was allowed with specific and explicit orders and, therefore, the respondent's argument that the orders given had no coercive effect is a misapprehension of the law.

20. Relying on **Black's Law Dictionary 9th Edition** on the meaning of an order, the applicant submitted that all court orders embody a command, direction or instruction and are absolutely amenable to enforcement proceedings. He also argued, referring to rule 5(2) of the Court of Appeal Rules, that mere institution of an appeal does not operate as stay of execution, except when there is a formal order of stay issued by a court.

21. According to the applicant, the court orders were clear that the President is bound by recommendations of the **JSC**; that once the judgment was pronounced, the respondent was under obligation to act on the recommendations forthwith and that having failed to appoint the nominee Judges, the respondent has failed to comply with the court orders. He relied on ***Shimmers Plaza Ltd vs National Bank of Kenya Ltd*** [2015] eKLR, on the duty of all persons and institutions to obey the law.

22. On what appropriate remedies are in the circumstances, the applicant cited ***Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another*** [2014] eKLR, for the submission that when a litigant approaches the court seeking remedies for alleged breach of fundamental rights, the court is mandated to determine the grievances and issue orders as it may deem fit; that disobedience of court orders seriously undermines the rule of law; that every time a public officer or institution disobeys a court order, there should be no celebration and that disobedience of a court order should be treated as a funeral with compassion for the death of the rule of law.

23. The applicant also relied on ***Republic v Returning Officer Kamukunji Constituency, Nairobi & Another*** [2008] eKLR, for the submissions that just as nature abhors vacuum, the enforcement of the rule of law abhors vacuum or a gap in its enforcement; ***Republic v Principle Secretary Ministry of Defence Ex-parte George Kariuki Waithaka*** [2018] eKLR, where it was held that where there is a lacuna with respect to enforcement of remedies provided under the constitution or statute, an aggrieved party is left with no alternative but to invoke the jurisdiction of the court; that the court is perfectly within its right to adopt such procedure as would effectually give meaningful relief to the aggrieved party and that a court of justice has no jurisdiction to do injustice.

24. The applicant urged the court to be guided by the above decisions and jurisprudence and allow the application.

25. The 1st and 2nd interested Parties, though given time to file both their response and submissions to the motion, they did not do so.

26. The 3rd Interested Party filed written submissions dated 26th June 2020 in support of the application and in opposition to the preliminary objection. The 3rd interested party submitted that the court is not functus officio in this matter. According to the 3rd Interested Party, the declarations made in the decision of 6th February, 2020, cannot be read in isolation of the timelines within which the appointments were to be made.

27. It contended that the reasonable timelines within which the appointments were to be made is a constitutional position; that the judgment of the court must be understood in the context of the functions of the court qua decision maker and that a court declares rights; duties and awards relief for injury to legally protected interests.

28. It is the 3rd Interested Party's case, that in view of the declarations made on 6th July, 2020, the court has residual supervisory powers to superintend over the core issue of appointment of the nominated Judges within the timelines. It also argued that the residual supervisory jurisdiction avails the court authority to enforce its decision and, therefore, the respondent's contention that the court is functus officio does not hold.

29. In the 3rd Interested Party's view, the question of appointment of the nominated Judges still remains outstanding and the court cannot look away from this niggling concern. It has jurisdiction to provide legal answers to the issue. It relied on ***Lepapa Ole Kisotui Ntulele Group Ranch 5 & Another*** [2017] eKLR, in urging the court to assume jurisdiction and address the question of failure to appoint the Judges within the timelines of 14 days. It argued, therefore, that the court is not functus officio to hear and determine the application.

30. The 3rd interested party went on to contend that disregard of court orders has become endemic. It relied on ***Eastern Radio Service v Tiny tots*** [1967] EA 312, where the Court of Appeal held that failure to give discovery and inspection may result in striking out of a suit. It urged this court to disregard the respondent's argument and the documents he filed, for continued violation of court orders with respect to timelines in this matter. It relied on ***Malar Ltd v National Bank of Kenya Ltd*** [2000] eKLR, where the plaintiff's pleadings were struck out for failure to adhere to court orders.

31. On whether the court has jurisdiction to entertain the application, the 3rd Interested Party answered in the affirmative. It argued that the issue of jurisdiction is three fold; original, supervisory and appellate jurisdiction, all of which are captured in Article 165 of the Constitution. The 3rd Interested Party submitted that when rendering its decision on the petition, the court exercised its original jurisdiction under Article 165 (2) (d) (i), and since the appointments have not been made to satisfy that decision, the court retains residual jurisdiction to supervise compliance with its orders.

32. In that regard, the 3rd Interested Party asserted that the court can entertain any applications and that it is vested with jurisdiction to hear the present application. It urged that the preliminary objection be dismissed and the motion be allowed.

33. We have considered the application, the preliminary objection and the responses thereto. We have also considered submissions by respective parties and the authorities relied on.

34. The respondent raised a preliminary objection to the application. Ordinarily the preliminary objection should have been heard first, but due to exigencies of time, and as parties had no objection to both the preliminary objection and the application being heard together, we decided to deal with the two simultaneously to save on judicial time and resources.

35. That being the case, we will consider the preliminary objection first, and should it succeed, there will be no need to consider the motion as that will be the end of the matter. Should it however fall, we will then consider the motion on merit.

Preliminary objection

Whether the court is functus officio and lacks jurisdiction

36. The respondent has opposed the motion on grounds that this court cannot entertain it for reason that it is functus officio and, therefore, has no jurisdiction to hear and determine it. The respondent's core argument is that the court made a final determination on 6th February, 2020 allowing the petition and made certain declarations. In his view, the court is now functus officio and cannot entertain the present application since some of the orders sought in the application, were sought in the petition but were not granted. He relied on a number of decisions to support his position.

37. The applicant and the 3rd Interested Party opposed the preliminary objection. They contended that the court is not functus officio and has jurisdiction to hear the application and grant the orders sought. In their view, the respondent has violated the orders made on 6th February, 2020 and, therefore, the court has jurisdiction to deal with the issue of enforcement of its judgment. They also relied on a number of decisions to support their position, contending that the court has residual supervisory jurisdiction to deal with the application as a means of enforcing its judgment.

38. We have considered the respective arguments of the parties on this matter. What is before us is a notice of motion filed after the conclusion of a constitutional petition and delivery of the court's decision. The notice of motion seeks not one but several orders. The respondent has opposed it arguing that the court is functus officio.

39. **Black's Law Dictionary, 10th Edition, page 787,** defines ***functus officio,*** *thus:*

"[having performed his or her office]" (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

40. The principle of functus officio implies that once a court passes a valid decision after a hearing, it no longer has authority to re-examine the matter and, therefore, cannot reopen the case. In other words, the authority of the court that has made such a decision has come to an end. This principle limits the authority of the court to take up such a case once it has pronounced the final order. The principle frowns upon reopening of litigation.

41. In that regard, the court of Appeal stated in ***Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)*** **[2014] eKLR,** that;

"Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon"

The Court, however, went on to state that:

"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions..." (emphasis ours)

42. We note that this position resonates with the Supreme Court's observation in ***Raila Odinga & 2 others v Independent Electoral and Boundaries Commission & 3 others*** (supra), that:

"[21] It is a legal and constitutional obligation of any Court, from the basic-level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the Court's jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the Court is satisfied and it declares as much. Even though, therefore, the Court concluded the hearing of the Petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the Petition, remained uncompromised."(emphasis added)

43. According to the Supreme court, the compelling principle, must be to do substantive justice so that justice must not only be done, but must also be seen to be done in every litigation that comes before the court rather than lay emphasis on the preference to the principle of finality as the respondent urges.

44. Flowing from the above principles, although a court may adjudge itself **functus officio** and decline to hear a matter, that is not to say that court would have no jurisdiction to hear the matter.

45. Secondly, whether a court should hold itself **functus officio** is a question of fact to be determined according to the facts and circumstances of each case. In so far as this application is concerned, the applicant seeks a number of orders and it is clear to us, and the respondent seems to state so in his submissions, that not all the orders sought in the motion were sought in the petition. Some of the orders sought in the motion were not the subject of the decision made on 6th February 2020 to render this court **functus officio** respect the entire motion.

46. Regarding this court's jurisdiction to hear this motion, we must state without any doubt, that a court of law cannot shirk its duty to deal with a matter presented before it for resolution, on some pretext or excuse that it has no jurisdiction. Jurisdiction is the core mandate of the court to determine cases or disputes presented before it.

47. In ***Samuel Kamau Macharia & another v Kenya commercial Bank Limited & 2 Others*** [2012] eKLR, the Supreme Court restated the position in **Re The matter of Interim Independent Electoral and Boundaries Commission,** [2011] eKLR, that jurisdiction of a court of law flows from the Constitution or statute, and that a court cannot arrogate to itself jurisdiction through judicial craft or innovation. It cannot do so by way of endeavours.

48. In the same vain, and in our view, except where jurisdiction is expressly limited by the same constitution, or specific law, the court cannot, through some interpretive approach, oust or limit its own jurisdiction. Declining jurisdiction is a serious matter that cannot be taken lightly. For the foregoing reasons, we do not agree with the respondent that this court is functus officio or lacks jurisdiction to deal with the motion before it. We find no merit in the preliminary objection and we accordingly overrule it.

The application

49. Having thus determined the preliminary objection, we now turn to consider the application. The Motion was brought under various Articles of the Constitution, sections 3 and 5 of the Judicature Act, the Civil Procedure Rules and all other enabling provisions of the law.

50. As we stated from the outset, the motion seeks several orders. It is predicted on the grounds on its face and the supporting affidavit by the applicant. The grounds in support of motion and depositions in the affidavit are more or less the same.

51. The gravamen of the application is that in the judgment of 6th February, 2020, the court issued declarations including; that the President is constitutionally bound by the recommendations of the **JSC** regarding the persons to be appointed as Judges of superior courts, and that the timelines for making such appointments is 14 days on the recommendations being made, among other declarations.

52. According to the applicant, despite the declarations, the appointments have not been made in violation of the Constitution and the court orders. He therefore brought the present application saying he was doing so in an effort to enforce and actualize that judgment.

53. Neither the respondent nor the Interested Parties filed responses to the motion. However, the 3rd interested party filed written submissions in support of the motion, while the respondent filed written submissions opposing it.

54. We have considered the motion, the affidavit in support, and the arguments for and against it. We have also considered the authorities relied on by respective parties.

55. As we have already stated at the outset of this ruling, the motion seeks several orders. The first order sought is a finding that failure to appoint the persons recommended as judges of the superior courts, the respondent is in breach of the court orders issued on 6th February 2020.

56. The court issued a declaration that the President was constitutionally bound by the recommendations made by the **JSC.** The court also held that the reasonable time within which appointment should be finalized is fourteen days. The Court again issued a declaration that continued delay to appoint the persons recommended as judges of the respective courts is a violation of the Constitution.

57. The applicant's argument that failure to appoint the persons as recommended is a violation of the court's decision is, without a doubt, true. The respondent did not argue that the applicant was not factually correct in his contention that there is violation of the court's decision. In that regard, we find no difficulty in agreeing with the applicant that there is indeed violation of the court's decision, with respect to finalization of appointment of the persons recommended as judges of the various superior courts. We must however point out that the applicant wants the court to find that it is the respondent who is in breach of the court orders.

58. We must point out that the respondent does not appoint persons recommended as judges, and it has never been his mandate to do so. It is clear to us that the applicant has misapprehended the mandate of the respondent in so far as the appointment of judges of the superior courts is concerned. Since the court did not direct its decision to the respondent, we are not persuaded that the applicant has made a case for this court to grant such an order. For that reason; we are unable to make the finding the applicant seeks.

59. The applicant has again asked the court to find that the appointment of the persons recommended by the **JSC** has constitutionally crystalized. We resist this invitation. This court made a decision on being moved through a constitutional petition. It held that the recommendations of the **JSC** on the persons to be appointed to superior courts, is binding on the President. That being

the case, this court cannot be moved by way of a motion to make what would clearly appear to us to be a declaratory order. We do not, therefore, agree with the applicant that this court can issue such an order through a motion as moved.

60. That is not all. The applicant has also asked the court to direct the respondent to publish names of the persons recommended for appointment as judges in the Kenya Gazette within 3 days and, in default, the 1st interested Party be directed to publish the names in a newspaper with nationwide circulation.

61. We are of the considered view that these orders cannot be granted in isolation of the order seeking a finding that the appointment of the persons recommended as judges of the various superior courts has crystalized. Only when such a declaration is made, would the court then consider whether to grant orders to gazette the names in the Kenya Gazette or publishing them in a newspaper, and whether that is a requirement.

62. The applicant further seeks an order directing that persons recommended for appointment as judges, be sworn in by the 2nd respondent, upon their names being published in the Kenya Gazette or a newspaper. We note that there is no 2nd respondent either in the petition or application. That being the case, this court cannot direct a non-existent party to perform such an obligation.

63. The applicant also prays that the Chief Registrar of the Judiciary be directed to execute instruments, to enable the persons recommended assume office of judge; that the Controller of Budget authorizes withdrawal of funds to facilitate assumption of office by these persons and the that the Inspector General of Police do facilitate the judges' security.

64. We once again note that the applicant seeks substantive orders through this motion. That notwithstanding, the persons to whom these orders are to be directed are not parties to the matter. A court of law should not act in vain by issuing orders against persons that are not parties to a suit or application. This may lead to difficulties in enforcing such orders.

65. Considering what we have stated above, and although it is clear that there is, violation of the constitution and the law, this court cannot, however, grant what are obviously substantive reliefs through a motion. In the premise, the motion is declined and dismissed. We make no orders as to costs.

Dated, signed and delivered at Nairobi this 30th day of July 2020.

.....

L. A. ACHODE

PRINCIPAL JUDGE

.....

J. A. MAKAU

JUDGE

.....

E. C. MWITA

JUDGE

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 427 OF 2019

DAVID KARIUKI NGARI.....1ST PETITIONER

INTERNATIONAL ECONOMIC LAW CENTRE.....2ND PETITIONER

VERSUS

JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

THE LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

THE SALARIES AND REMUNERATION COMMISSION.....2ND INTERESTED PARTY

THE CABINET SECRETARY, NATIONAL TREASURY AND

PLANNING.....3RD INTERESTED PARTY

JUDGMENT

Introduction

1. Vide Kenya Gazette Notices No. 1420, 1421 and 1422 of 15th February, 2019 respectively, the **Judicial Service Commission, (JSC)** the 1st Respondent , advertised vacancies in the offices of the Judge of the Court of Appeal, Judge of the Environment and Land Court **(ELC)** and Judge of the Employment and Labour Relations Court, **(ELRC)**. It called for applications from suitably qualified persons and conducted recruitment processes to fill the vacancies in the respective offices.

2. The 1st Respondent recommended 11 persons for appointment to the office of Judge of the Court of Appeal, and forwarded their names to the President on 23rd July, 2019. Subsequently, on 13th August, 2019, the 1st Respondent recommended 20 persons and another 10 for appointment to the office of Judge of the **ELC** and the **ELRC** respectively.

3. The issues at the centre of this petition, relate to the process employed by the 1st Respondent in arriving at the names of the persons recommended for appointment as Judges of the respective courts, and the post-appointment process, namely; whether the President's power on appointment of Judges under **Article 166** of the **Constitution,** is merely ceremonial; or whether, the President can decline to appoint, and provide written reasons on his decision, under **Article 135** of the **Constitution**.

The Petitioners' Case

4. David Kariuki Ngari, the 1st Petitioner, is a Kenyan citizen, while International Economic Law Centre, the 2nd Petitioner, is a Company limited by guarantee, registered in Kenya. The Petitioners argue that before publishing **Gazette Notice Nos. 1420, 1421** and **1422** of 15th February, 2019, the 1st Respondent failed to accord the public, the 1st, 2nd and 3rd Interested Parties and other stakeholders, an opportunity for public participation, contrary to **Article 10** of the **Constitution**.

5. The Petitioners further state, that the 41 Judges recommended by the 1st Respondent for appointment comprise an aggregate of 64 percent increase in the offices of Judge of the respective courts, which is not sustainable and does not offer tangible improvement in access to and delivery of justice to the People of Kenya. They accuse the 1st Respondent of failing and neglecting to conduct a needs assessment to determine the optimal number of judges needed for the respective offices in violation of **Articles 10, 172,** and **201** of the **Constitution, section 4(b)** of the **Court of Appeal (Organization and Administration) Act, 2015** and **section 79** of the **Public Finance Management Act**.

6. The Petitioners submit that these provisions place a huge burden on the 1st Respondent to conduct a needs assessment for the respective courts, prior to the declaration of vacancies in those courts by the Chief Justice. They argue that in failing to do so, the 1st Respondent abdicated its responsibility, and is attempting to pass off recommendations from the President of the Court of Appeal, the Presiding Judge of the ELC and the Principal Judge of the ELRC, as a needs assessment process and report.

7. It is the Petitioners' case that the conduct of a needs based assessment is a policy-informed step by step process that should be done with a clear guideline set by the 1st Respondent; that it involves public and stakeholder participation and should result in a formal resolution of the 1st Respondent with clear direction to the Chief Justice to declare vacancies in the office of Judge. They assert that the responsibility of conducting a needs assessment cannot be delegated to the Chief Justice or to any other Judge.

8. According to the Petitioners, the ELC cases with a subject matter of below Kshs. 20,000,000/= account for about 90 percent of the active case load, whereas the ELRC matters with a subject matter of below Kshs. 20,000,000/= account for 80 percent of the active case load. They contend that following the Chief Justice's Practice Directions made pursuant to the **Magistrates' Courts Act, 2015,** these cases are within the jurisdiction of the Magistrates' Courts. In their view, the Courts which need more judicial officers to promote access to justice are the Magistrates' Courts which are well distributed within the Country.

9. It was submitted that the **State of the Judiciary and the Administration of Justice Annual Report, (SOJAR), 2017-2018,** does not constitute a needs assessment report but merely represents an analysis of caseload per court. The Petitioners contend that the report confirms their view that Magistrates' Courts are the busiest. They therefore assert that the declaration of the vacancies in the offices of Judge of Appeal, ELC and ELRC is a contradiction of the Judiciary's own report.

10. It is their position that the Parliamentary Report by the National Assembly's Departmental Committee on Justice and Legal Affairs, titled "***Report on the consideration of the 2017/2018 Report of the Judiciary on State of the Judiciary and the Administration of Justice***" cannot also pass as a needs assessment process and report of the 1st Respondent. In their view, the Report does not recommend a specific number of Judges for recruitment nor does it specify reasons for appointment of any cadre or number of Judges.

11. According to the Petitioners, had the 1st Respondent conducted public participation, it would have enabled it to determine the extent of the deficiencies in access to justice, prior to the recruitment of additional judges. They contend public participation was necessary in determining the problem and prescribing the solution as it would have guided the 1st Respondent on the most optimal

manner of addressing the problem. They argue that while the 1st Respondent has the mandate to nominate persons for appointment as Judges, it must to do so in consultation with other institutions.

12. They assert that the 1st Respondent cannot wriggle out of its duty to ensure public participation in the entire recruitment process by merely stating that the legal framework of the **Judicial Service Act** did not require it to consult the public before initiating the process of declaration of vacancies. They contend that since public participation applies to all facets of public governance, the 1st Respondent was under a duty to facilitate meaningful public participation in the appointment of Judges: determine the need for them, before the declaration of vacancies by the Chief Justice. In this respect, the Petitioners rely on the Supreme Court decision in ***British American Tobacco Kenya PLC v Cabinet Secretary for Health & 5 others.*** **Petition No. 5 of 2017, [2019] eKLR**

13. The Petitioners accuse the 1st Respondent of misconstruing its duty in conducting public participation by stating that it did not have to conduct one at the preliminary stage before declaration of vacancies. The Petitioners assert that, the 1st Respondent ought to have engaged the public and all stakeholders prior to declaration of the vacancies in the office of Judge at that stage since it is the foundation of the process. They aver that failure to conduct public participation at that stage resulted in a likelihood of the process setting off on the wrong tangent.

14. The Petitioners argue that public participation is at the heart of the People's sovereignty and the 1st Respondent was under a duty to ensure that the recruitment process was anchored on it. They contend that the 1st Respondent failed to inform the public of the need for additional judges and judicial officers so that the public could give an input as to which courts to prioritize in the recruitment exercise and to what extent. To that extent, they contend, the 1st Respondent ignored both quantitative and qualitative components through which it could have obtained salient statistical data on the cost-benefit analysis of the proposed appointments.

15. The Petitioners pointed out that whereas the 1st Respondent had alluded to insufficient human resource capacity as one of the challenges facing the Judiciary, there is no such information in the replying affidavit of Paul Ndemo. According to the Petitioners, the Report does not recommend the appointment of additional judges as a solution to reduction of backlog and access to justice.

16. In the Petitioners' view, the appointment of a large number of Judges to the ELC and ELRC, is not necessary since the majority of disputes filed in relation to those courts, fall within the jurisdiction of the Magistrates' courts. To them, it would have been more economical had the 1st Respondent recruited more magistrates and not Judges.

17. The Petitioners contend that the 1st Interested Party failed to conduct a thorough reference check, background investigation and vetting with agencies such as the Ethics and Anti-Corruption Commission (EACC), the 1st Interested Party and other authorities on the suitability of the candidates for the respective positions, resulting in recommending disqualified persons.

18. With regard to the Office of Judge of the Court of Appeal, the Petitioners accuse the 1st Interested Party of conducting the exercise of shortlisting, interviewing and recommending names of persons for appointment in a manner discriminatory against members of the Law Society of Kenya, the 1st Interested Party, and other non-judge candidates.

19. The Petitioners further accuse the 1st Interested Party that it failed to take into account the adverse reports and the immense public and stakeholder outcry against some of the candidates as a result of which candidates lacking in integrity were nominated for appointment in contravention of **Chapter Six** of the **Constitution,** and **Articles 166, 167** and **168**.

20. They urge that the process spelt out under **Article 168** of the **Constitution** for removal of a judge once appointed, is painstaking, lengthy and expensive and prudent management of public resources requires that where there is good reason to suspect an unconstitutionality, illegality or irregularity in the process of appointment of a judge, such appointment should be suspended or stopped altogether.

21. It is their case, therefore, that the 1st Respondent failed to take into account relevant considerations prior to recommending the 41 individuals for appointment into office of Judge. They contend that while they are not opposed to the appointment of Judges, such appointment is not an event, but a process which affects the citizenry and should, therefore, be done in accordance with the Constitution and the law.

22. The Petitioners submit that if the President were to act as a mere rubber stamp of the recommendations of the 1st Respondent in

exercise of his powers to appoint judges under **Article 166** of the **Constitution,** he would be making appointments resulting from a flawed process in violation of his duty to uphold the Constitution as stipulated under **Article 131(2).**

23. In the Petitioners' view, the question which begs urgent interpretation by this Court, is whether the President's power to appoint judges under **Article 166** of the **Constitution,** is merely ceremonial, or whether he can decline to appoint and give written reasons for the decision under **Article 135.**

24. According to the Petitioners, the facts of the instant Petition differ from those obtaining in ***Law Society of Kenya v Attorney General & 2 others,*** **Constitutional Petition No. 313 of 2014, [2016] eKLR.** Their argument is that in the present Petition, there are various issues which were not in issue in the **Law Society Case,** namely; questions of failure to conduct a needs assessment; lack of public participation; integrity issues arising post-nomination; lack of cost-benefit analysis *vis-à-vis* the Judiciary budget and the President's duty to uphold the Constitution. They urge that, in any event, this court is not bound by that decision.

25. To this end, the Petitioners submit, that in construing the Constitution on a matter as weighty as separation of powers between the arms of government, the court ought to do so in a manner that promotes good governance and the rule of law guided by **Article 259** of the **Constitution.**

26. The Petitioners, therefore, pray for:

a. A declaration that the nomination of 11 persons for appointment to the office of Judges of the Court of Appeal on 22nd July, 2019 by the 1st Respondent for appointment by the President of the Republic of Kenya is unconstitutional.

b. A declaration that the nomination of 20 persons for appointment to the office of Judge of the Environment and Land Court on 13th August, 2019 by the 1st Respondent for appointment by the President of the Republic of Kenya is unconstitutional.

c. A declaration that the nomination of 10 persons for appointment to the office of Judge of the Employment and Labour Relations Court on 13th August, 2019 by the 1st Respondent for appointment by the President of the Republic of Kenya is unconstitutional.

d. A declaration that the appointment by the President of the Republic of Kenya of any of the 41 persons to the office of Judge of the respective courts for which the 1st Respondent recommended them shall be unconstitutional, null, and void.

e. A declaration that the President has power to decline to appoint any person recommended by the Judicial Service Commission, if subsequent to such recommendation, issues about any such person that would otherwise disqualify such person from appointment into the office of Judge of the Republic of Kenya emerge provided that where the President declines to appoint any such person, the President shall do so in writing.

f. A declaration that the Judicial Service Commission has power to decline to recall the name of any person recommended to the President for appointment to the office of Judge of the Republic of Kenya if subsequent to such recommendation by the Judicial Service Commission, issues about any such person that would otherwise disqualify such person from appointment into the office of Judge of the Republic of Kenya emerge.

g. Any other alternative remedy this Honourable Court will deem just and fit to grant.

h. Costs of this Petition.

The 2nd Respondent and the 3rd Interested Party's Case

27. The Attorney General, the 2nd Respondent, is sued in his capacity as the principal legal advisor to the national government pursuant to **Article 156** of the **Constitution,** while the Cabinet Secretary for the National Treasury and Planning, the 3rd Interested Party, is mandated to *inter alia* formulate, implement and monitor macro-economic policies involving expenditure and revenue. The

2nd Respondent and the 3rd Interested Party, support the Petitioners' position in this petition.

28. The 2nd Respondent and the 3rd Interested Party did not file responses, but made oral submissions in support of the petition. In their oral submissions, they echoe the Petitioners' submissions, asserting that the decisions of the 1st Respondent are not absolute; are reviewable and that the court ought to consider them against the provisions of **Article 10** of the **Constitution**. They rely on **Article 161** of the **Constitution** on the composition of the Judiciary, to submit, that the 1st Respondent is not part of the Judiciary and cannot, therefore, refer to a report made by the President of the Court of Appeal, who is neither its member nor agent.

The 1st Respondent's Case

29. Judicial Service Commission, the 1st Respondent, is a constitutional Commission established under **Article 171(1)** of the **Constitution,** to promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. It opposes the Petition through a replying affidavit sworn by Paul Ndemo, the Deputy Chief Registrar of the Judiciary on 9th December, 2019 and written submissions of even date.

30. According to Mr. Ndemo's deposition, the 1st Respondent, is unique in its membership and composition, as it was designed by the framers of the Constitution, to have representation from the Judiciary, Attorney General, two representatives appointed by the President to represent the public, a nominee of the Public Service Commission and representation from the statutory body responsible for the professional regulation of advocates, to safeguard the independence of the Judiciary. He asserts that under **Articles 248** and **249** of the **Constitution**, the 1st Respondent is an independent constitutional body subject only to the Constitution and the law, and not subject to direction or control by any person or authority.

31. In the affidavit, Mr. Ndemo deposes that the Petitioners' claim that the 1st Respondent failed to conduct a needs assessment is not only false, but is also out of touch with the current predicament facing the administration of justice in the country. He states that there has been an acute shortage of Judges in the Court of Appeal, the ELC and the ELRC, as detailed in the annual State of the Judiciary Reports (SOJAR) filed before National Assembly and presented to the President.

32. Mr. Ndemo deposes that in the 2017-2018 Report, insufficient human resource capacity was flagged as one of the challenges facing the Judiciary, and the need for human resource capacity improvement, especially the appointment of optimal number of judges and hiring magistrates.

33. It is the 1st Respondent's case that the National Assembly Departmental Committee on Justice and Legal Affairs, considered the report and in its report dated 9th May, 2019, observed that the current 32 Judges in the ELC and 12 Judges in the ELRC, are inadequate to expeditiously deal with cases in those courts. He argues that after considering the challenges faced by the Judiciary, on 9th May 2019, the Committee recommended to the full House that the National Treasury, should allocate adequate resources to enable the Judiciary appoint more Judges and hire more Magistrates for expeditious determination of cases.

34. Mr. Ndemo is of the view, that the needs assessment undertaken by the Judiciary and the 1st Respondent, is a process and not an event. He asserts that in determining the need to appoint Judges, the 1st Respondent consults widely, considers reports from the Judiciary, including the SOJAR, requests from various courts across the country all of which include views and concerns of the public regarding the shortage of judges.

35. It is the 1st Respondent's case that the Petitioners' contention that it had not taken into account the fact that the bulk of cases are handled by Magistrates' Courts, is misplaced since most disputes filed before the ELC involve parcels of land in urban and semi urban areas whose values exceed the pecuniary jurisdiction of Magistrates' Courts. The 1st Respondent pointed out that the Presentation made in January 2019 by the Presiding Judge of the ELC confirmed the urgent need for the appointment of additional judges to handle cases. It also contends that the Petitioners do not appreciate that appeals from the Magistrates' Courts in land cases are also handled by the ELC.

36. The 1st Respondent pointed out that in January, 2019, the Presiding Judge of the ELRC made a presentation highlighting the shortage of judges as the court's biggest challenge with a total 12 Judges serving the entire country and requested for the appointment of 10 additional judges to assist the court to reduce case backlog.

37. It is the 1st Respondent's position that the Petitioner's claim that the Chief Justice violated **Article 10** of the **Constitution** by failing to provide an opportunity for public participation in the determination of the number of vacancies to be declared, is founded on a miscomprehension of the constitutional requirement of public participation in the appointment process. It asserts that there is no role for public participation at this preliminary stage, which is governed by **paragraph 3** of **Part II** of the **First Schedule** to the **Judicial Service Act**. It urges that under **Article 118** of the **Constitution** public access and participation is an imperative on Parliament and not the Judiciary.

38. The 1st Respondent contends that prior to the declaration of vacancies and the commencement of the recruitment process, the Judiciary had factored in its budgetary estimates, the recruitment of additional Judges. It refers to a letter dated 6th April, 2018 through which the Judiciary forwarded to the National Assembly, the Judiciary Programme Based Budget (PBB) for the MTEF period 2018/19 -2020/21 and the Judiciary Recurrent Budget Estimates and Projects for the Financial Years 2018/2019. In the proposed budget estimates, the Chief Registrar of the Judiciary had notified the National Assembly that the inadequate number of Judicial Officers and staff had hampered the expeditious disposal of cases. To this end, the Judiciary required more resources to establish an additional 107 court stations across the country and recruit over 2000 judicial officers and staff. It urges that neither the National Assembly nor the National Treasury objected to the proposal.

39. It is further submitted that after the declaration of vacancies, the 1st Respondent advertised vacancies in the Court of Appeal, the ELC and the ELRC, invited applications from interested parties and shortlisted applicants for interviews; that in compliance with the constitutional requirement for public participation in the appointment process, the 1st Respondent requested members of the public to submit any information of interest against any of the shortlisted candidates for consideration before making a determination.

40. The 1st Respondent submits that it wrote to various state agencies and other organisations, requesting for information and background checks for all the shortlisted applicants. These included: Ethics and Anti-Corruption Commission; The National Intelligence Service; The Judiciary Ombudsman; The Kenya National Commission on Human Rights; The Advocates Complaints Commission; The Kenya Revenue Authority; The Higher Education Loans Board; The Law Society of Kenya; Sheria Sacco Limited and Law Society of Kenya SACCO.

41. The 1st Respondent submits that it considered and deliberated upon all the reports provided by the state agencies and members of the public; that complaints were then served upon the affected candidates for their response and all these formed part of the selection criteria. According to the 1st Respondent, some of the candidates were not recommended on the basis of the adverse and particularized information received and considered by it.

42. The 1st Respondent contends that in a letter dated 5th July, 2019 the National Intelligence Service (**NIS**) had indicated that it had "*adverse reports against some of the Applicants*" but none of the alleged adverse reports were furnished nor were any particulars thereof provided to enable it put those adverse reports to the affected candidates for their responses as required by **Article 47(1)** of the **Constitution** and **section 4(3)(g)** of the **Fair Administrative Action Act**.

43. It is submitted that the 1st Respondent had in exercise of its general powers under **paragraph 19** and **20** of **Part VII** of the **First Schedule** to the **Judicial Service Act, 2011** extended the timelines within which the **NIS** was to provide particulars of the adverse reports. It gave the **NIS** a 7 day extension, ending on 15th July, 2019 within which to provide the particulars. The **NIS** did not however furnish any particulars of the allegation. Instead it responded by a letter dated 21st July, 2019 stating that ***"it had discharged its obligation in its first letter."***

44. According to the 1st Respondent, it subjected the applicants to a rigorous vetting process, which included a comprehensive consideration of their character, integrity and professional qualifications. In its view, it discharged its mandate in accordance with the Constitution and the **Judicial Service Act** in recommending the 41 successful applicants for appointment as Judges.

45. The 1st Respondent contends that **Part VI** of the **Judicial Service Act** which provides for the "*post nomination procedures*", has no provision for the President to reject or disapprove of any of the nominees or even for the 1st Respondent to "withdraw or reconsider" the names of any of the nominees once it makes the recommendation. The 1st Respondent argues that under the Constitution and the law, the duty of the President as Head of State in the appointment of Judges is ceremonial and is only intended to formalize the appointment of the persons recommended by the 1st Respondent.

46. The 1st Respondent avers that the Attorney General, as the Principal advisor to the national government, participated in the

appointment process and signified his approval of the recommendation by signing the resolution on all nominees. This was because he was satisfied that all constitutional and legal requirements in the appointment of judges had been met.

47. The 1st Respondent relies on the decision in ***Law Society of Kenya*** (supra), for the proposition that the role of the President in the appointment of persons it recommends, is merely ceremonial, and that the President's mandate as spelt out under **Article 132** of the **Constitution,** does not include the power to vet the suitability of persons recommended for appointment as judges.

48. According to the 1st Respondent, the determination of suitability and meeting of the appropriate constitutional and statutory qualifications for appointment as Judges rests with it. It further argues that this is intended to safeguard judicial independence and for that reason, the President's duty to appoint is without discretion. The 1st Respondent relies on an article by Professor Karuti Kanyinga; **"Kenya Democracy and Political Participation: A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS)"** for the observation that the Constitution has considerably altered the structure of governance, particularly; restructuring the executive; the legislature and the judiciary, including the mode of appointment of judges.

49. The 1st Respondent relies on the decision of the Constitutional Court of South Africa in **Justice Alliance of South Africa vs. President of Republic of South Africa and Others** (as consolidated with) ***Freedom Under Law vs. President of Republic of South Africa and Others and centre for Applied Legal Studies and Another v President of Republic of South Africa and Others*** **[2012] ZACC 24** and the decision in ***Karuhanga v Attorney General*****, (Constitutional Petition Number 0039 of 2013) [2014] UGCC 13 (4 August 2014)**. For the proposition that the doctrine of separation of powers is a constitutional design and that this Court is empowered to intervene whenever there is an imminent threat to the Constitution.

50. It contends that the Supreme Court decision in ***Speaker of the Senate & Another v Hon. Attorney General & Others*** **Advisory Opinion Reference No. 2 of 2013 [2013]** eKLR addressed and contextualized the vexed question of separation of powers. Further that the Constitutional Court of South Africa had in ***Hugh Glenister v President of the Republic of South Africa & 11 Others,*** held that it is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.

51. The 1st Respondent argues that the President is under a constitutional duty to appoint the persons recommended by the 1st Respondent as judges without unreasonable delay. In its view, if the decision of the President not to appoint the persons nominated by the 1st Respondent is left unchecked, it will erode and diminish the constitutional mandate of the 1st Respondent. It further argues that the delay has subjected the successful applicants to unwarranted speculation on their suitability as Judges of the Superior Courts.

52. With respect to public participation at the preliminary stage of declaration of vacancies, and the alleged contravention of **Article 10** of the **Constitution**, the 1st Respondent submits that the **Judicial Service Act** does not contemplate or provide that the public would determine the number of vacancies to be declared by the Judiciary. It contends that the public participation expressly provided for under the Act is in the appointment process where the public is afforded an opportunity to submit to the 1st Respondent written memoranda on any information regarding the Applicants for consideration. It asserts that it satisfactorily facilitated and conducted public participation during the process of recruitment.

53. To this end, the 1st Respondent refers to the decisions in ***Doctors for Life International vs. Speaker of the National Assembly & Others*** **[2006] ZACC 1; Samuel Thinguri Waruathe and 2 Others v Kiambu County Government & 2 Others [2015] eKLR** and ***British American Tobacco Kenya PLC v Cabinet Secretary for Health & 5 Others*** **Petition No. 5 of 2017 (unreported),** where public participation as a guiding principle was the subject of constitutional interpretation.

The 1st Interested Party's Case

54. The Law Society of Kenya, the 1st Interested Party, is a body corporate established under **section 3** of the **Law of Society of Kenya Act** to uphold the Constitution and advance the rule of law and the administration of justice, and protect and assist members of the public in matters relating to or ancillary and incidental to the law. The 1st Interested Party joined the 1st Respondent in opposing the Petition. It filed written submissions dated 16th December, 2019, echoing the position adopted by the 1st Respondent in every respect.

55. The 1st Interested Party urges that to begin with, this Court lacks jurisdiction to hear and determine the instant Petition since it seeks an abstract interpretation of the Constitution, which is not permitted by **Article 165(3)** thereof. It contends that the Petitioners cannot purport to bring this Petition under **Articles 22(1), 23(1)** and **165(3) (b)** of the **Constitution,** for enforcement of fundamental rights and freedoms, when there is no threat to fundamental rights and freedoms. It also argues that the Petition is an abuse of court process and is brought in bad faith, as there is no controversy for the court to resolve. It notes that although the totality of the Petition is to declare the recommendation of the 41 persons nominated for appointment to the office of Judge unconstitutional, it does not raise a justiciable controversy.

56. According to the 1st Interested Party, the Petitioners' claim that the process employed by the 1st Respondent in arriving at the names of the persons recommended to the President for appointment as judges was unconstitutional, illegal, irregular, fatally defective, null and void for which the court needs to urgently intervene, is not supported by relevant provisions of the constitution and statute claimed to have been violated. It asserts that the Petitioners failed to demonstrate how **Article 166(1)(b)** of the **Constitution,** on which appointment of Judges is anchored, has been violated or threatened with violation.

57. In its view, the Petitioners want this court to stop the President from carrying out a constitutionally ordained mandate without explaining how, if at all, **paragraph 16** of the **First Schedule** to the **Judicial Service Act,** is unconstitutional. It argues that the Petition is incompetent since the Petitioners have not demonstrated what the appointment process entails or how the process was marred with failures.

58. It is the 1st Interested Party's position, that courts have held that in cases concerning the enforcement of fundamental rights and freedoms under the Bill of Rights, and enforcement of the Constitution, a party seeking the court's relief must plead his case with precision, failure to which the court should decline jurisdiction as it cannot engage in an academic or hypothetical exercise. It refers to the decision in ***John Harun Mwau & 3 Others v Attorney General and 2 Others*** **Petition No, 65 of 2011,** where the court agreed with the dicta in ***Republic v Truth Justice & Reconciliation Commission & Another ex parte Augustine Njeru Kathangu and 9 Others*****,* Nairobi Misc. App. No. 490 of 2009 (*unreported*),** that an applicant has to clearly set out the acts or omissions that, in his or her view, contravene the Constitution; specify the provisions that those acts or omissions contravene and the prayers or reliefs sought. On this basis, it asks the court to decline jurisdiction in this matter

59. The 1st Interested Party reiterated the Petitioners' submission that the 1st Respondent is not required by law to conduct mandatory needs assessments before declaring vacancies to the office of Judge. It asserts that both **section 4(3)** of the **Court of Appeal (Organization and Administration) Act, 2015** and **section 4(3)** of the **High Court (Organization and Administration) Act, 2015,** which provide for a judicial needs assessment, are not couched in mandatory terms as they employ the use of the word ***"may."***

60. The 1st Interested Party submits that public participation is an integral part of the process in judicial appointments and has 3 levels, namely; the composition of the 1st Respondent as stipulated under **Article 171(2)** of the **Constitution**; the selection process of nominees to the position of judge, and the Parliamentary vetting of nominees to the Office of Chief Justice and Deputy Chief Justice.

61. The 1st Interested Party agrees with the 1st Respondent, that **Article 166(1)(b)** of the **Constitution** is in mandatory terms, that the President shall appoint all other Judges in accordance with the recommendation of the 1st Respondent. It also refers to **paragraph 16** of the **First Schedule** to the **Judicial Service Act** which provides that the 1st Respondent shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity or withdrawal of a nominee. This, it says, is an essential inbuilt constitutional safeguard to the independence of the 1st Respondent. It also supports the 1st Respondent's submission, that the role of the President in the appointment of judges is ceremonial.

62. In the 1st Interested Party's view, this court is bound to take into account the reason that the drafters of the Constitution deemed it fit to designate a robust, independent, impartial, competent and capable commission to protect and promote the independence of judiciary. It urges that the Constitution is the supreme law of the land, binding all persons and all state organs at either level of government and any act or omission in contravention of the Constitution is therefore invalid.

63. Relying on the decision in ***Equity Bank Limited vs. West Link Mbo Limited*** **Civil Application NO. 78 of 2011 [2013] eKLR,** it submits that the theory of holistic interpretation of the Constitution requires an interpretive approach that takes into account, alongside a consideration of the text and other provisions in question, non-legal phenomenon such as Kenya's historical,

economic, social, cultural and political context.

64. The 1st Interested Party submits that this petition presents the clearest instance of abuse of the court process to achieve collateral purposes, other than the genuine enforcement of the Constitution and prays for its dismissal, with costs.

2nd Interested Party's Case

65. The Salaries and Remuneration Commission, the 2nd Interested Party, is an independent constitutional Commission established under **Article 230** of the **Constitution** to, *inter alia*, set and regularly review the remuneration and benefits of all state officers. It did not file any response or submissions to the petition and left the matter to the court.

Analysis and Determination

66. We have considered this petition, the supporting affidavit, the replying affidavit as well as the rival submissions. In our view, the following issues arise for determination:

I. Whether this court has jurisdiction to hear and determine this petition

II. Whether the 1st Respondent was required to conduct needs assessment before declaration of vacancies

III. Whether there was need for public participation before declaration of vacancies

IV. Whether this court should restrain the President from appointing persons recommended

Whether the court has jurisdiction

67. The Petitioners filed this petition to challenge the process employed by the 1st Respondent in arriving at the names of persons recommended to the President for appointment as judges, which they allege was unconstitutional, illegal, irregular, fatally defective and null. The petition, therefore, seeks to declare the recommendation of the 41 persons for appointment to the office of Judge, unconstitutional. As a consequence, it also seeks to restrain the President from appointing them to the respective positions as recommended.

68. The 1st Respondent argues that it followed the Constitution and the law in the declaration of vacancies, invitation of applications from interested parties, shortlisting of applicants, conducting interviews and recommending successful applicants for appointment. In particular, the 1st Respondent states that it complied with the constitutional requirements for public participation in the appointment process.

69. The 1st Interested Party contends that the petitioners' averments are not supported by relevant provisions of the Constitution or statute said to be violated. It asserts that the petition does not raise a justiciable controversy for the court's determination, and that the petition as drawn and filed, does not show how **Articles 22(1), 23(1)** and **165(3) (b)** and **(d)** of the **Constitution** have been violated, to support the prayers sought. In its view, this court does not have jurisdiction to entertain a non-justiciable matter.

70. This argument is not a novel one. This being a petition challenging a constitutional process, it is important that the court considers the petition holistically before making a determination on the issues raised therein.

71. Moreover, **Article 165(3) (d),** grants this court jurisdiction respecting the interpretation of the Constitution, including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. On our part, looking at the totality of the petition, it alleges that the 1st Respondent acted in contravention of the constitution, which is a question for this court's determination.

72. In any event, the Court of Appeal, (**Musinga JA**), stated in ***Equity Bank Limited vs. West Link Mbo Limited*** **[2013]**

eKLR, that:

[52]"Every provision of the Constitution must be construed according to the doctrine of interpretation that the law is always speaking, thus there cannot be a legal void, a situation where the court is unable to grant a justiciable relief because of interpreting the law pedantically and concluding that it has no jurisdiction to grant such an order."

73. We therefore find and hold that this court has jurisdiction to hear and determine this petition.

Whether the 1st Respondent was required to conduct needs assessment before declaration of vacancies

74. The Petitioners contend that the 1st Respondent did not conduct a needs assessment on the complement of judicial officers in terms of courts and cadre before it gazetted vacancies; advertised, interviewed and recommended names of persons to be appointed into the office of Judge. This, they argue, would have determined the optimal number of judicial officers needed for the office of Judge of Appeal, Judge of the **ELC** and Judge of the **ELRC.** They, therefore, opine, that this violated **Articles 10, 172** and **201** of the **Constitution; section 4(3)** of the **Court of Appeal (Organization and Administration) Act; Section 4(3)** of the **High Court (Organization and Administration) Act**; **section 5** of the **Employment and Labour Relations Act** and **Section 79** of the **Public Finance Management Act**.

75. Article 10 (1) on national values and principles provides that:

"The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions"

76. Under **Sub Article (2),** the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development and Culture. Transparency, accountability and public participation, are founding values in our Constitution.

77. Section 4(3) of the **Court of Appeal (Organization and Administration) Act** requires the 1st Respondent to determine the optimal complement of Judges in the Court of Appeal, to declare vacancies, recruit and recommend persons for appointment as Judges of the Court of Appeal. The section states thus:-

"(3) Despite subsection (1)(b), the Commission may, from time to time, conduct or cause to be conducted a judicial needs assessment and recommend the appropriate number of judges required for appointment to the Court" (emphasis)

78. The Petitioners contend that the 1st Respondent is obligated to determine vacancies and recommend names for appointment into the offices of Judge of the **ELC** and **ELRC,** only after conducting a needs assessment in accordance with the above provisions, and in keeping with international best practices.

79. The Petitioners further argue that **section 5(1) (b)** of the **Employment and Labour Relations Act,** requires the 1st Respondent to determine the complement of Judges to be appointed into the office of Judge of the **ELRC.** The **Section** provides:-

"(1) The Court may consist of—

(a) The Principal Judge; and

(b) Such number of Judges as may be determined and recruited by the Judicial Service Commission and appointed in accordance with Article 166(1) of the Constitution."

80. Similarly, **section 5 of the Environment and Land Court Act 2012** provides:-

"**The Court shall consist of the Presiding Judge and such number of Judges as may be determined by the Judicial Service Commission from time to time.**" (Emphasis)

81. From the aforesaid sections, the 1st Respondent is required to determine the optimal number of Judges for appointment in accordance with **Article 166(1)(b)** of the **Constitution**.

82. The Petitioners' contention is that in spite of clear provisions of the law placing an obligation on the 1st Respondent to conduct a needs assessment for the respective courts, as a condition-precedent before declaration of vacancies in all offices of Judge, it abdicated this responsibility and is trying to pass off recommendations from the President of the Court of Appeal, the Principal Judge of the ELRC and the Presiding Judge of the **ELC** as a needs assessment process and report. In their view, the responsibility of conducting a needs assessment cannot be delegated to the Chief Justice or any other Judge.

83. The 1st Respondent's response is that the Petitioners' claim that it did not conduct a needs assessment is not only false, but is also out of touch with the current predicament facing the administration of justice in the country. It argues that there is an acute shortage of Judges in the Court of Appeal, the ELC and the ELRC as detailed in the SOJAR that was filed before the National Assembly and presented to the President.

84. According to the 1st Respondent, the 2017-2018 Report highlighted insufficient human resource capacity as one of the challenges facing the Judiciary and, therefore, the need for human resource capacity improvement through appointment of optimal number of judges and hiring magistrates respectively. The 1st Respondent argues that the National Assembly Departmental Committee on Justice and Legal Affairs considered the report and observed that the current 32 Judges in the ELC and 12 Judges in the ELRC, are inadequate to expeditiously deal with cases in those courts. The Committee recommended that the National Assembly and the National Treasury do allocate adequate resources to enable the Judiciary appoint more Judges and recruit Magistrates.

85. We have considered the rival arguments on this issue. It is clear from the record that in 2016, the then President of the Court of Appeal, now the 2nd Respondent in this petition, recommended to the 1st Respondent, the appointment of not less than 6 judges to that court. He pointed out then, that a number of judges in that court were due to retire. His successor, and the current President of the Court reiterated the need for hiring of more judges intimating, that by December 2019, the complement of judges in that court would be down to 15.

86. Similarly, the Principal Judge and the Presiding Judge of the ELRC and ELC respectively, submitted reports to the 1st Respondent showing that those courts needed more judges for their optimal performance given the caseload in each court.

87. What we are required to consider, therefore, is whether the 1st Respondent is bound by law to conduct mandatory needs assessment before declaring vacancies in the office of Judge. The Petitioners, the 2nd Respondent, and 3rd Interested Party have argued that it is mandatory, while the 1st Respondent and 1st Interested Party maintain that it is not mandatory to carry out needs assessment at the preliminary stage

88. Our understanding of needs assessment is that it is a process undertaken to enable one address a gap between an existing condition and the desired situation.

89. We have looked at section **4(3)** of the **Court of Appeal *(Organization and Administration)* Act, section 5(1)** of the **ELRC Act** and section 5 of the **ELC ACT**. The words used in the Court of Appeal Act are *"The commission may from time to time conduct or cause to be conducted a judicial needs assessment."* On the other hand, the ELRC Act and ELC Act, do not provide for needs

assessment. They provide for such number of judges as may be determined by the 1st Respondent and appointed in accordance with **Article 166(1)** of the **Constitution.**

90. We find, first, that the **Court of Appeal *(Organization and Administration)* Act** is not couched in mandatory terms, as the word used is "***may***" and therefore, does not impose a mandatory requirement on the 1st Respondent to conduct a needs assessment as a condition precedent to appointment of Judges as urged by the Petitioners. Second, even where a needs assessment is to be conducted, the Act does not provide for the manner in which it must be done.

91. Having considered the rival arguments and the law on the issue, we find and hold that there is no mandatory requirement for the 1st Respondent to conduct a needs assessment before declaring vacancies in the office of judge. That notwithstanding, we also find that the 1st Respondent conducted a needs assessment when it called for reports from the leadership that manages the respective courts, which informed the optimal number of judges to appoint.

Whether there was need for public participation before declaration of vacancies

92. The Petitioners plead in the petition that the 1st Respondent denied the general public, the 1st, 2nd and 3rd interested parties and other stakeholders, an opportunity to engage in public participation in determining the number of vacancies required to be filled before publishing and declaring the vacancies

93. The Petitioners further contend that the 1st Respondent contravened **Article 160(3)** of the **Constitution** which provides that salaries and benefits payable in respect of Judges, is a charge on the Consolidated Fund and, therefore, requires participation of all relevant agencies in national planning.

94. They cite the decision in ***British American Tobacco Kenya PLC v Cabinet Secretary for Health & 5 others*, Petition No. 5 of 2017, [2019] eKLR,** where the Supreme Court observed that public participation and consultation, is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people.

95. The Petitioners' contention, therefore, is that public participation applies to all facets of public governance and as such, the 1st Respondent was under an obligation to facilitate meaningful public participation in the recruitment of Judges right from the point of determining the need for additional Judges, before declaring the vacancies.

96. The 1st Respondent and the 1st Interested Party do not agree with the Petitioners' contention, terming it incorrect and untrue. They assert that there was no need to conduct public participation in order to determine the need for additional judges, since that is the mandate of the Chief Justice and the 1st Respondent. They argue that public participation comes in at the point of interviewing the applicants as required by the Constitution and the Judicial Service Act and not otherwise. They hold the view, that there is no constitutional or legal requirement for public participation at the preliminary stage, before declaration of vacancies in the office of judge.

97. As we have already stated elsewhere in this judgment, **Article 10** provides for the national values and principles of governance which are binding on all State organs, State officers and public officers, when interpreting the Constitution, applying or interpreting or enacting any law, or making or implementing public policy. **Sub Article (2)** provides for the national principles which include; Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and Sustainable development.

98. Public participation is, therefore, a founding principle in our Constitution as an element of transparency and accountability. Through public participation, the public takes part in the governance of the country. In ***British American Tobacco Kenya PLC v Cabinet Secretary for Health & 5 others*, Petition No. 5 of 2017, [2019] eKLR,** the Supreme Court underscored the importance of public participation, thus:

"[96]... we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County governments..."

99. In **Matatiele Municipality and Others v President of the Republic of South Africa and Others (2) (CCT 73/05) [2006] ZACC 12; 2007 (1) BCLR 47 (CC),** the Constitutional Court of South Africa was clear that:

"The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include, the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interest, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."

100. In **Samuel Thinguri *Waruathe and 2 Others v Kiambu County Government & 2 Others* [2015] eKLR**, the Court observed that;

"Public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be a true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public."

101. The Supreme Court made it clear in ***British American Tobacco Kenya Ltd v Cabinet Secretary for Health & 5 others*** (supra), that as constitutional principle under Article 10(2), public participation applies to all aspects of governance; the public officer and/or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation; that lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; that the onus is on the public entity to give effect to this constitutional principle using reasonable means; that Public participation must be real and not illusory; that it is not a cosmetic or a public relations act; that it is not a mere formality to be undertaken as a matter of course just to fulfill a constitutional requirement, and that there is need for both quantitative and qualitative components in public participation.

102. The Supreme Court further stated that Public participation is not an abstract notion; it must be purposive and meaningful; Public participation must be accompanied by reasonable notice and reasonable opportunity. According to the Supreme Court, reasonableness will be determined on a case to case basis; Public participation is not necessarily a process constituting of oral hearings, but written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

103. It is important to appreciate that the Supreme Court was clear that allegations of lack of public participation do not automatically vitiate the process. Such allegations have to be considered within the peculiar circumstances of each case, and that the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

104. Article 171(2) of the **Constitution** provides for the composition of the 1st Respondent. This consists of, the Chief Justice who is appointed with the approval of the National Assembly, one Supreme Court Judge, one Court of Appeal Judge, one High Court Judge and one Magistrate, the Attorney-General, two advocates, one person nominated by the Public Service Commission and one woman and one man to represent the public. The latter two are appointed by the President with the approval of the National Assembly. We note that the composition of the 1st Respondent no doubt, represents some form of public participation.

105. We say so, because representatives of judges of the Supreme Court, the Court of Appeal, the High court and Magistracy and the Law Society of Kenya to the 1st Respondent, are elected by their respective peers, which brings in an element of public participation. The Chief Justice and the Attorney General are members by virtue of their offices. The Attorney General is the Principal Legal Advisor to the National government and represents national government interests in the 1st Respondent. The representative from the public Service Commission and the persons appointed by the President, also represent public interest. In that respect, the composition of the 1st Respondent is a product of public participation and they act in the public interest.

106. Appointment of Judges is a constitutional and legal process. The mandate to recommend persons for appointment to the office of judge, is bestowed on the 1st Respondent by Article 166(1) as read with Article 172(1)(a). The **Judicial Service Act** provides for the process to be followed in the recruitment of judges. **Paragraph 3** of **Part II** of the **First schedule** to the **Act** provides:

"(i) Where a vacancy occurs or exists in the office of a judge, the Chief Justice shall within fourteen days place a notice thereof in the Gazette and the Commission shall thereafter-

(a) post a notice on its website;

(b) send notice of the vacancy to the Law Society of Kenya and any other lawyers' professional associations; and

c. circulate the notice in any other appropriate manner.

(ii)The advertisement and the notice referred to in paragraph (1) shall-

a. describe the judicial vacancy;

b. state the constitutional and statutory requirements for the position;

c. invite all qualified persons to apply;

d. inform interested persons how to obtain applications; and

e. set the deadline for submission of application which period shall not be less than twenty-one (21) days after the announcement of the vacancy by the Commission."

107. Paragraph 6 of the Schedule requires the 1st Respondent to conduct an initial review within 14 days of the deadline for the receipt of applications to confirm conformity with the necessary requirements, while **paragraph 7** provides that the 1st Respondent should within 21 days of the initial review, verify and supplement information provided by the applicants by communicating to all references and former employers who should be asked to comment on the applicants' qualifications.

108. Under **paragraph 8**, the 1st Respondent is required within 30 days of the reference check, to investigate and verify, in consultation with the relevant professional bodies or any other person, the applicant's professional and personal background for information that could pose a significant problem for the proper functioning of the courts, should the applicant be appointed.

109. Section 30, on the appointment of judges, provides as follows:-

"(i) for the purposes of transparent recruitment of judges, the Commission shall constitute a selection panel consisting of at least five members.

(ii)the function of the selection panel shall be to shortlist persons for nomination by the Commission in accordance with the First Schedule.

(iii)the provisions of this section shall apply to the appointment of the Chief Justice and Deputy Chief Justice except that in such case, a person shall not be appointed without the necessary approval by the National Assembly.

(iv)members of the selection panel shall elect a Chairperson from amongst their number.

(v) subject to the provisions of the First Schedule, the selection panel may determine its own procedure."

110. We have considered the Petitioners' arguments and those of the 1st Respondent and the 1st Interested Party on this issue. We have also considered the constitutional provisions on public participation and the decisions relied on. Further still, we have perused the statutory provisions that guide the 1st Respondent in determining needs of the courts, declaring vacancies, calling for applications and conducting interviews before recommending persons for appointment as judges. The Petitioners' challenge is not on the process of recruitment, ***per se***, but that there was no preliminary public participation prior to the declaration of vacancies in the office of judge in the respective courts.

111. In our considered view, we do not think the Constitution and the law require the 1st Respondent to conduct public participation prior to declaration of vacancies whenever there is need to recruit judges or judicial officers. The 1st Respondent, as a State organ, exercises its mandate on behalf of the people of the Republic of Kenya.

112. Our reading of the Judicial Service Act, more particularly, **Section 30, Paragraph 3** of **Part II** of the **First Schedule, Paragraphs 6, 7** and **8** of the Schedule, is that public participation is a mandatory requirement after declaration of vacancies, and not at the preliminary stage before declaration of the vacancies.

113. We have also considered the nature of the function of the 1st Respondent ***vis a vis*** the Petitioners' submissions. We note that the petitioners have not demonstrated the purpose public participation would have served at the preliminary stage before declaration of vacancies. The **Judicial Service Act** does not also contemplate or provide that the public would determine for the Judiciary the number of vacancies to be declared.

114. The public participation expressly provided for under the **Act,** is in the appointment process, where the public is given ample opportunity to submit to the 1st Respondent any information regarding the Applicants to be considered, before the 1st Respondent makes its recommendation to the President. The specific provision for public participation in the appointment process sufficiently provides for public participation and failure to do so at the stage of declaration of vacancies, does not vitiate the process. Lack of public participation at that stage, must be considered within the specific circumstances and provisions under the **Act**.

115. In compliance with the statutory requirement, the 1st Respondent has demonstrated that it requested members of the public to submit any information of interest against any of the shortlisted applicants for consideration. Further, by letters dated 29th April 2019, it requested the relevant professional bodies and government agencies, to conduct background checks on all shortlisted applicants and submit to it their findings for consideration and action. In the circumstances, we find and hold that the 1st Respondent complied with the Constitution and law on this issue.

Whether the court should restrain the President from appointing persons recommended

116. The Petitioners, supported by the 2nd and 3rd Respondents, have argued that the President's power on appointment of Judges under **Article 166(1)** is not merely ceremonial. In their view, the President can decline to appoint the recommended persons and provide reasons in writing under **Article 135**. The Petitioners urge that the President has sworn under **Article 131(2)** to adhere to and defend the Constitution. It is their contention that if in the process of appointment of Judges, the Constitution has been disregarded, or an appointment may lead to a contravention of the Constitution, then the President cannot condone, ignore or acquiesce in such violation.

117. The 1st Respondent and 1st interested Party on their part, contend that the role of the President in the appointment of judges is ceremonial. In their view, the Presidential mandate as spelt out under **Article 132** does not include the power to vet the suitability of persons recommended by the 1st Respondent for appointment as judges. They assert that the mandate to determine the suitability of the persons to recommend for such appointment rests with the 1st Respondent. They also contend that if the people of Kenya intended to confer on the President discretion to decide who to appoint as judge or not, they would have done so in **Article 132.** They urge that failure by the President to formalize the appointments violates **Article 131 (2).**

118. This issue has two limbs. First; whether this court can restrain the President from discharging mandatory constitutional obligations, and second, whether the Constitution and the law allow post nomination reconsideration. We have considered the rival arguments by parties herein on this issue, the constitutional mandate of the President and that of the 1st Respondent on the appointment of judges.

119. Article 172(1) provides that;

"The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall—

a. recommend to the President persons for appointment as judges..."

120. Similarly, **Article 166(1)** provides that;

"The President shall appoint—

(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and

(b) all other judges, in accordance with the recommendation of the Judicial Service Commission…" (Emphasis ours)

121. The Constitution states in mandatory terms, that the 1st Respondent ***shall*** recommend persons for appointment as judges and the President ***shall*** appoint them as recommended by the 1st Respondent. The Constitution does not donate mandate to the President to perform any other act in this regard, upon receipt of the names recommended by the 1st Respondent, except to appoint them.

122. Article 249(2) provides that commissions and the holders of independent offices are subject only to the Constitution and the law; and are independent and not subject to direction or control by any person or authority. This independence clause is intended to safeguard the independence of the 1st Respondent, as a commission and that of the judiciary. For that reason, without more, the President's duty to appoint is without discretion.

123. The Petitioners' argument that the President's role in the appointment of judges cannot be merely ceremonial because the 1st Respondent remits to him reports on the process of recruitment of Judges, has no constitutional or legal foundation. The 1st Respondent, while forwarding to the President the names recommended for appointment and the reports, discharges its constitutional mandate and that cannot be interpreted as conferring on the President any discretion to reject, review, or decline to appoint any of the persons so recommended. We therefore find that the Petitioners' argument has no merit.

124. We turn to consider the second limb, that the President has power to reject any of the names recommended for appointment, if subsequent to recommendation, issues arise that would otherwise have disqualified such a person. The Petitioners argue that the President has received adverse reports on some of the persons recommended to him by the 1st Respondent for appointment as judges. For that reason, they maintain, the President has discretion to decline to appoint the affected persons.

125. The Petitioners contend, that the process spelt out under **Article 168** for removal of a Judge once appointed, is painstaking, lengthy and expensive. In their view, prudent management of public resources requires that where there is good reason to suspect unconstitutionality, illegality or irregularity in the process of appointment of a Judge, such appointment should either be suspended or stopped all together. They blame the 1st Respondent for failing to withdraw the names of persons it recommended for appointment as Judges despite adverse reports against them.

126. According to the Petitioners, if the President were to act as a mere rubber stamp and conveyor belt of the recommendations of the 1st Respondent, in exercise of his powers to appoint Judges under **Article 166** of the **Constitution**, he would be in violation of his duty to uphold the Constitution as required by **Article 131,** by making appointments where some of the persons recommended, face adverse reports.

127. In their view, the facts of the instant petition are different from those in ***Law Society of Kenya vs Attorney General and 2 others,*** (supra). They urge the court to distinguish the facts of the two petitions. They assert that since the current petition raises the question of integrity arising post-nomination, and the President's duty to uphold the Constitution, this was not an issue in the **Law Society Case** (supra).

128. The 1st Respondent's take is that the court should boldly interpret and give effect to the Constitution and affirm the limited role contemplated for the President in the appointment of judges in the new constitutional dispensation. The 1st Respondent further argues that, while the doctrine of separation of powers is a constitutional design the court is empowered to intervene whenever there is an imminent threat to the Constitution. It relied on among others, the decision of **Speaker of the Senate & another v Attorney General & others** (supra).

129. The 1st Respondent maintains that the President is under a constitutional duty to appoint persons it recommends as judges. In its

view, if the decision by the President not to appoint the persons recommended is left unchecked, this will erode and diminish its constitutional mandate. This view is fully supported by the 1st Interested Party, which contends that the Petitioners want to stop the President from discharging a constitutional mandate.

130. We have anxiously considered the arguments on this limb. As we have already stated, **Article 166(1) (b)** provides for the role of the President in the appointment of Judges of the Superior Courts. The **Article** is express and mandatory that the President shall appoint all other Judges in accordance with the recommendation of the 1st Respondent. The above provision is an essential inbuilt check in the architecture of the Constitution to safeguard the independence of the 1st Respondent and the Judiciary.

131. We further note, that **paragraph 16** of the **First Schedule to the Judicial Service Act,** provides that the 1st Respondent shall not reconsider its nominees after the names are submitted to the President, save in the case of death; incapacity or withdrawal of a nominee. Similarly, this is a safeguard to ensure that the 1st Respondent does not revisit the issue post nomination, after the names are submitted to the President for appointment under any circumstances except as provided by the law.

132. It is clear to us that **Paragraph 16** which provides for *"post nomination procedures* does not contain the words *"withdrawal or reconsideration" of the names of nominees* used in the Petitioners' pleadings. Simply put, the Paragraph does not permit reconsideration of the names post recommendation.

133. We take into account the fact that the makers of our Transformative **Constitution** deemed it fit to designate a robust, independent, impartial, and competent organ to promote and facilitate Judicial independence and accountability.

134. In this regard, we agree with Professor Karuti Kanyinga's observation in his article; "***Kenya Democracy and Political Participation: A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS)"*** *(at* page 61), that:

"The Constitution has considerably altered the structure of governance, particularly by: a) restructuring the executive to be independent from the legislature; b) establishing two houses of the legislature; and c) establishing a very independent judiciary whose judges are hired by an equally independent Judicial Service Commission (JSC). Furthermore, all three branches of government have mechanisms through which they account to the public; they have various avenues and levels of public participation."

135. He contrasted the current Constitution with the repealed Constitution that vested executive authority in the President, which he would then exercise either directly or through subordinate officers. The President appointed judges, controlled the calendar and agenda of Parliament and controlled the public service. Such was the power of the executive.

136. Article 259(1) behoves this court to interpret the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance. Further, **Article 159(2)** demands that in exercising judicial authority, the courts and tribunals shall protect and promote the purpose and principles of the Constitution.

137. It is clear to us, that the National Intelligence Service (**NIS),** in its letter dated 5th July 2019, indicated that it had adverse reports against some of the applicants. However, the adverse reports were not furnished despite the extension of time by the 1st Respondent to accommodate it, bearing in mind that the process of recruitment of judges is statutorily time bound.

138. We reiterate, that the appointment of Judges is anchored in **Article 166(1)(b),** as read with **Article 172(1)(a)** of the **Constitution,** which provide that Judges shall be appointed by the President in accordance with the recommendation of the 1st Respondent. We also note that under the **Judicial Service Act,** it is the 1st Respondent that is tasked with the mandate to determine suitability and the appropriate constitutional and statutory qualifications for persons to appoint as Judges. In that regard, the Constitution and the law contemplate no other role for the President, any other authority or body in determining the persons to appoint as judges.

139. The Petitioners have only made a general sweeping statement that the 1st Respondent contravened **Chapter Six** and the above Articles, and failed to ***"take into account glaring evidence of lack of integrity of certain candidates.***" The petitioners and any other

person, body or authority, had an opportunity to place before the 1st Respondent evidence of lack of integrity on the part of any of the persons recommended for appointment as judge. This they failed to do.

140. We must point out here, that even if evidence of of lack of integrity or any other reason that would otherwise disqualify an applicant from being recommended for appointment as judge, was available, it is a matter that must first be placed before the 1st Respondent for its consideration and not any other State organ or State officer. It therefore cannot be an issue before this court at this stage.

141. The jurisdiction of this court, as we understand it, regarding the issues arising from the petition, is to consider the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the Constitution

142. This court does not act on mere speculation of violation or threat to violate the Constitution. There must be evidence that the threat to violate is real and imminent. That is not the position in this petition.

Conclusion

143. We have considered the petition and the arguments in support thereof. We find that the Petitioners have not demonstrated the manner in which **Articles 160(3), 166, 167** and **168** have been violated, infringed or threatened with violation, to call on this court to act as they urge.

144. In the premise, we do not find merit in this petition and consequently dismiss it. Regarding costs, we are of the view that costs being discretionary, and this being public interest litigation, the appropriate order to make, as we hereby do, is that each party do bear their own costs.

Dated, Signed and Delivered at Nairobi this 6th Day of February, 2020.

.....

L. A. ACHODE

PRINCIPAL JUDGE

.....

J. A. MAKAU

JUDGE

.....

E. C. MWITA

JUDGE